

ANGLIA RUSKIN UNIVERSITY

FACULTY OF BUSINESS AND LAW

**HAVE THE NEW PROCUREMENT RULES SIMPLIFIED AND IMPROVED
THE PUBLIC PROCUREMENT PROCESS?**

R.J. WREN

**A thesis in partial fulfilment of the requirements of Anglia Ruskin University for the
degree of Professional Doctorate in Law**

Submitted: November 2019

ACKNOWLEDGEMENTS

I must give special thanks to my supervisors, Dr. Aldo Zammit-Borda from Anglia Ruskin University and Dr. Ama Eyo of Bangor University for their understanding, guidance and encouragement and for providing calm support at every stage along the way.

This thesis would not have been possible without the help, assistance and support of my wife Sandra who has suffered with me and inspired me throughout the six-year journey whilst maintaining our professional practice.

ANGLIA RUSKIN UNIVERSITY

ABSTRACT

FACULTY OF BUSINESS AND LAW

PROFESSIONAL DOCTORATE IN LAW

**HAVE THE NEW PROCUREMENT RULES SIMPLIFIED AND IMPROVED THE
PUBLIC PROCUREMENT PROCESS?**

R.J. WREN

November 2019

Public services which must be procured are currently provided in partnership with the private and third sector, with an estimated £284 billion a year in 2018 spent in the United Kingdom on buying goods and services from external suppliers – amounting to around a third of public expenditure. The need for the reform and modernisation of public procurement law and practice to increase the efficiency, effectiveness and understanding of public procurement in the EU has long been recognised resulting in the new Procurement Directive 2014/24/EU.

This Professional Doctorate in Law research examines whether and to what extent the new EU rules which have been transposed into the Public Contracts Regulations 2015 (as amended) have modernised, simplified and made more flexible the public procurement process in the United Kingdom.

This research undertakes a black letter / doctrinal approach of the relevant laws in order to analyse and compare the past and present legal frameworks. A black letter law methodology was followed as I needed to undertake a legal/textual analysis of the new rules to better understand how they compare and contrast with the old rules.

In undertaking an analysis of all the changes, modifications and reforms to the law from Directive 2014/24/EU and from my experience in practice when applied to the procurement process I selected a number of specific topics for my research. The topics selected were Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders. These topic areas were selected as they represent topics which regularly occur in public procurement and therefore provide an important and reasonable indication of the kinds of challenges the new rules give rise to in practice.

As black letter law methodologies do not capture the application of the law in practice, I have followed an empirical interview methodology to record the perceptions of experienced practitioners of public procurement. The voices and perspectives of these practitioners are currently largely absent from the available academic literature. The investigation was undertaken using 27 participants and whilst this is not a large number and the findings are not generalisable to the larger community, these participants have a cumulative experience of over 1700 procurements and therefore have provided rare and invaluable insights into the procurement process.

This research finds that several participants considered that the new rules had made some areas in the procurement process more complex and made the procurement procedure difficult to operate in practice. The new rules were not perceived by most participants to have simplified or improved the public procurement process. This may be as a result of either a lack of understanding of the rules in certain areas or a resistance to change existing procedures and processes followed by the participants. From these findings further research on the rules is required together with the need for practical training and guidance on the rules, obligations and how they are understood and applied in practice.

Key words: EU law, UK law, Public procurement in practice, Selection Criteria, Contract Award Criteria, Framework Agreements, Abnormally Low Tenders.

CONTENTS

	Page
PART 1 - INTRODUCTORY ISSUES AND LEGAL ANALYSIS	1
Chapter 1 – Introduction to the thesis	1
1.1 The Research	1
1.2 Importance of the research	4
1.3 Research Aims and Research Questions	8
1.3.1 Aims of the research	8
1.3.2 Objectives of the research	8
1.3.3 Research Question	9
1.4 Literature Review	9
1.4.1 Literature on Public Procurement Law	10
1.4.2 Public Procurement	15
1.4.3 Distinguishing Public Procurement from Private Procurement	18
1.4.4 The objectives of public procurement systems, rules and regulations.	25
1.4.5 Public Procurement as a policy tool	35
1.5 Methodology	38
1.6 The structure of the thesis	39
1.7 The Researcher	40
1.8 The journey to a Professional Doctorate	41

	Page
Chapter 2 Context for the research, background to and historical review of public procurement and an overview for background purposes of Directive 2004/18/EC and the Public Contracts Regulations 2006	43
2.1 Section 1 : Introduction	43
2.2 Section 2 : Context and foundation for the research	44
2.2.1 The researcher's experience of public procurement in practice	44
2.2.2 Understanding public procurement in practice in the UK	46
2.2.3 Overview of challenges made by suppliers for failures and breaches on the part of contracting authorities	52
2.3 Section 3 : Background and introduction to public procurement with an historical overview	53
2.3.1 Procurement in the United Kingdom (UK) prior to the Public Contracts Regulations 2006 (PCR 2006).	53
2.3.2 The EC and the EU Procurement rules	60
2.3.3 The Treaty Framework	61
2.3.4 The Procurement Directives	62
2.3.5 UK Implementation of European Procurement Directives	67
2.4 Section 4 : Overview of Directive 2004/18/EC and the Public Contracts Regulations 2006 (both of which have been repealed)	70
2.4.1 General Introduction	70
2.4.2 Changes and reforms to the 2004 Public Sector Directive	71
2.4.2.1 Changes, simplification and clarifications	71
2.4.2.2 Changes for increased flexibility	73
2.4.2.3 Rules on abnormally low tenders	76

	Page
2.4.3 Overview of the Public Contracts Regulations 2006	76
Chapter 3 Analysis of the Public Procurement Directive 2014/24/EU and the Public Contracts Regulations 2015	81
3.1 Section 1 : Introduction	81
3.2 Section 2 : The four topics selected from the changes, modifications and reforms to Directive 2014/24/EU for the empirical research included in Chapters 4 and 5 of the thesis	81
3.2.1 General Introduction	81
3.2.2 Specific consideration of the four selected topics	82
3.3 Section 3 : Background to Directive 2014/24/EU	92
3.4 Section 4 : Changes, modifications and reforms introduced by Directive 2014/24/EU	96
3.4.1 Reforms relating to the four topic areas examined in my research concerning Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders	97
3.4.2 Other changes and reforms introduced	100
3.5 Section 5 : Literature on the simplification and flexibilisation of the rules in Directive 2014/24/EU	104
3.6 Section 6 : Further provisions and specific reforms under the PCR 2015	107
3.6.1 General introduction	107
3.6.2 Additional obligations under the PCR 2015.	109

	Page
PART 2 : EMPIRICAL RESEARCH	113
Chapter 4 - Empirical research : methodology and approach	113
4.1 Introduction	113
4.2 Design of the research	114
4.2.1 Design	114
4.2.2 Adopted research approach	115
4.3 Participants in the research	117
4.3.1 Introduction	117
4.3.2 Sampling construction and procedures	118
4.3.3 Description of and information on categories and the recruitment of the participants	122
4.3.3.1 Introduction	122
4.3.3.2 Policy maker and central direct buying entity	122
4.3.3.3 Recruitment of participants under this classification	123
4.3.3.4 Procuring entities	124
4.3.3.5 Procurement Consultants and Legal Advisers	129
4.4 Methods of Data Collection	130
4.5 The Interview Guide	134
(1) Section A – General Questions	135
(2) Section B – Selection Criteria	136
(3) Section C – Contract Award Criteria	137

	Page
(4) Section D – Framework Agreements	138
(5) Section E – Abnormally Low Tenders	139
(6) Section F – Concluding Question	139
4.6 Ethical Issues	140
 Chapter 5 : Analysis of Data and Empirical Findings	 141
5.1 Introduction	141
5.2 Responses of the participants and analysis of their comments	144
5.2.1 Section A - General questions on related issues to the research	144
5.2.2 Section B - Selection Criteria	156
5.2.3 Section C - Contract Award Criteria	176
5.2.4 Section D - Framework Agreements	193
5.2.5 Section E - Abnormally Low Tenders	216
5.2.6 Section F - Concluding Question	229
 Chapter 6 Conclusion	 233
6.1 Introduction	233

	Page
6.2 Research questions and supplementary questions to show how the new rules are operated by practitioners.	234
6.2.1 Supplementary question 1 : Has the modernisation of the new rules simplified and made more flexible the procurement process in practice in the selected topic area.	234
6.2.2 Supplementary question 2 : Have the procuring entities and consultants / legal advisers understood and applied the new rules in relation to the four subject topics areas.	236
6.2.3 Supplementary question 3 : Have the new rules in the four topic areas resulted in an improvement in the approach of procuring entities and consultants / legal advisers?	237
6.2.4 Main Research Question : Have the new procurement rules in Directive 2014/24/EU simplified and improved the public procurement process?	241
6.3. Originality and contribution to knowledge	242
6.4 Conclusion and further study	243
Bibliography	245

List of Figures

Figure 1.1 The Environment of the Public Procurement System	24
---	----

List of Tables

Table 1.1 Seven Stages of Public Procurement	34
Table 4.1 Five sampling methods	120
Table 4.2 indicating summary of participants invited and subsequently included in my research	130

List of Appendices

Appendix 1 Invitation to participate in a Public Procurement research study	263
Appendix 2 Interview Guide	265

PART 1 - INTRODUCTORY ISSUES AND LEGAL ANALYSIS

Chapter 1 – Introduction to the thesis

1.1 The Research

The study relates to Public Sector Procurement laws and regulations in the UK which are based on EU laws and regulations. For many years it has been recognised that public procurement rules were complex, and this had resulted in waste, inefficiencies and a lack of understanding on how the rules should be operated which was often added to by the lack of qualified practitioners in public procurement.¹ Many attempts have been made to draft and implement rules which are less complex and more simple to operate.

The background to the EU Procurement Directives since their adoption in 1964 and 1971 and prior to 2004 are covered in Chapter 2 to this thesis. After consultation in 2004 the Public Sector Directive² was introduced by the European Union. The reforms for this Directive originated from a Green Paper of 1996, *Public Procurement in the European Union : Exploring the Way Forward*.³ There were two main aims, the first to simplify the rules (involving clarification through guidance) and the second intention being to increase the flexibility available to procuring entities in order to take into consideration new practices or market reality.⁴ The 2004 Directive was transposed into the Public Contracts Regulations 2006⁵ in England, Wales and Northern Ireland. In Chapter 3 I confirm that both the 2004 Directive and the Public Contracts Regulations 2006 have subsequently been repealed. Following the adoption of the 2004 legislation the European Commission commenced a general review of the Directive together with the neglected subjects of remedies and defence procurement.⁶ The development of these subjects occurred separately but the finalisation of

¹ House of Commons, Public Administration Select Committee (PASC) – Government Procurement: Government Response to the Committee's Sixth Report of Session 2013-14 (Stationery Office Ltd 2014) 51

² Parliament and Council Directive 2004/18 (OJ 2004 L134/114) on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts

³ European Commission, Green Paper, Public Procurement in the European Union, Exploring the Way Forward (1996) COM 583 final

⁴ Sue Arrowsmith, 'The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?' (2006) 35(3) Public Contracts Law Journal 345

⁵ Statutory Instrument (SI 2006 No 5) Public Procurement England and Wales, Public Procurement Northern Ireland

⁶ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edn, Sweet & Maxwell 2014) Vol 1(1).

the remedies regime and the Defence Procurement Directive⁷ was subsequently evaluated. The Commission concluded that there was neither major nor urgent need to amend the Remedies Directives and it was decided to maintain them in their current form without any further modification at this stage.⁸

Following consultation and publication of proposals which occurred in 2011, in 2014 a new Directive⁹ on public procurement was introduced together with a Utilities Directive¹⁰ and a Concessions Directive.¹¹ My research specifically covers the 2014 Public Procurement Directive (Directive 2014/24/EU). The primary objectives of the revision to the EU procurement regime is the modernisation, simplification and so called flexibilisation of the regime.¹² The introduction of the Directive was to overhaul and to make significant changes to existing obligations and further to introduce new requirements.¹³ Directive 2014/24/EU was transposed into the Public Contracts Regulations 2015¹⁴ (PCR 2015) in England, Wales and Northern Ireland.

The main project is to ascertain whether the new rules in Directive 2014/24/EU which are said to have been modernised, simplified and made more flexible have in practice improved the public procurement process. Consequently, the research will focus on a significant review of Directive 2014/24/EU and the PCR 2015 (as amended). This will also cover whether there has been an improvement in the understanding and approach of users of the new rules in the operation and delivery of public sector procurements.

⁷ Directive 2009/81/EC of the European Parliament and of the Council of July 13, 2009 on the co-ordination of procedures for the award of certain works, supply or service contracts by contracting authorities in the fields of defence and security [2009] O.J. L216/76.

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:28:FIN> p8

⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

¹⁰ Directive 2014/25/EU of the European Parliament and of the Council of the 26 February 2014 on procurement by entities operation in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] O.J. L94/243.

¹¹ Directive 2014/23/EU of the European Parliament and of the Council of the 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

¹² COM (2011) 896 final, 2011/0438 (COD) Proposed procurement directive. Explanatory Memorandum section 1

¹³ Steen Treumer, 'Evolution of the EU Public Procurement Regime: The New Public Procurement Directive' in Francois Lichere, Roberto Caranta and Steen Treumer (eds) *Modernising Public Procurement – The New Directive* (DYØF Publishing 2014) 9

¹⁴ Statutory Instrument 2015 No. 102 Public Procurement

In relation to the impact of Brexit on my research, as my research also relies heavily on the PCR 2015 (as amended) I consider that my research will be relevant for the operation of public procurement in the UK whether or not there is a deal for Brexit.

To support this statement, I refer to the following points. In December 2018, the Public Procurement (Amendments etc.) (EU Exit) Regulations 2019¹⁵ (Public Procurement Regulations 2019) was laid amending several statutes, most notably the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016 and the Concessions Contracts Regulations 2016. The Public Procurement Regulations 2019 are in draft form and despite affecting a number of statutes giving effect to certain EU regulations in domestic UK law, the Public Procurement Regulations 2019 leave the UK public procurement regime largely unchanged. The Public Contracts Regulations 2019 were subsequently amended by the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019.¹⁶ The proposed changes are aimed at allowing the current procurement regime to work largely unchanged in a ‘no deal’ scenario and so my research is not affected.

Should the UK access the WTO Agreement on Government Procurement (GPA) in its own right as a result of Brexit, as the UK’s current procurement regulations which are the implementation of EU procurement directives are arguably GPA compliant as the Directives are intended to provide for procedures that comply with the GPA.¹⁷ There is no obligation on the part of the UK to change their current rules.

One commentator has said with reasonable certainty that the future of the UK public procurement regulations will remain as they are until at least after Brexit.¹⁸

¹⁵ Draft Statutory Instrument 2019 – Exiting the European Union Public Procurement.

¹⁶ Draft Statutory Instrument 2019 – Exiting the European Union on Public Procurement (No. 2).

¹⁷ Ping Wang, ‘Brexit and the WTO Agreement on Government Procurement (“GPA”)’ (2017) 26 PPLR Issue 1 Sweet & Maxwell 46.

¹⁸ Sue Arrowsmith, ‘The Implementations of Brexit for Public Procurement Law and Policy in the United Kingdom’ (2017) 26 PPLR Issue 1 Sweet & Maxwell 31

1.2 Importance of the research

Public procurement refers to the procedure by governments and state-owned entities to procure goods, services and works.¹⁹ Public procurement accounts for a substantial proportion of taxpayer's money. Accordingly, governments are expected to undertake the public procurement efficiently and meet a high level of conduct in order to ensure high quality services, provide value for money and further to safeguard public interest.

Public procurement is a central pillar of services delivery for governments. With the sheer volume of spending that public procurement represents well governed public procurement plays a major role in fostering the efficiency of the public sector and establishing the trust of citizens. It has been said that a well-designed public procurement system also contributes to achieving other goals such as environmental protection, innovation, job creation and development of small and medium sized enterprises.²⁰

Sound public procurement policy brings immediate tangible macroeconomic benefits and the operation of more cost effective procurement allows for a relaxation of budgetary pressure and creative fiscal space.²¹ Public procurement is being increasingly identified as a means of achieving policy objectives from the reduction of carbon and as a basis of achieving innovation resulting in a more resilient and inclusive economy.²²

Public procurement is important as every year over 250,000 public authorities in the EU spend around 14% of Gross National Product (GDP) which is around €2 trillion per week on the purchase of services, works and supplies.²³

¹⁹ Sylvia de Mars, The limits of general principles : a procurement case study [2013] 38(3) ELR 316

²⁰ OECD, Recommendations of the Council on Public Procurement, Directorate of Public Procurement and Territorial Development 2015

²¹ Lucas Vogul, *Macroeconomic Effects of Cost Savings in Public Procurement, European Countries* (Economic Papers 2009)

²² Abby Semple, *Practical Guide to Public Procurement* (OUP 2015)

²³ European Commission, Public Procurement <<https://ec.europa.eu/growth/singlemarket/public-procurement-en>> 2018

High quality public services depend on modern, well managed and efficient procurement. The improvement of public procurement can yield substantial savings and even a 1% efficiency gain could save €20 billion per year.²⁴

In 2018 in the United Kingdom (UK) the public sector spent a total of £284 billion a year on the procurement of goods, works and services (including capital assets) which accounted for 33 percent of public sector spending (total managed expenditure).²⁵

The need for the reform and modernisation of public procurement law and practice to increase the efficiency, effectiveness and understanding of public procurement in the EU has long been recognised. In addition, the requirement for public procurement law and practices to be made less complex has been raised over several years by practitioners and many organisations involved in public procurement. The complexity of the rules were referred to by the Local Government Group²⁶ as part of a Survey of their Members in 2011 in the UK in response to the European Commission Green Paper²⁷ in 2011 and in a UK Government Procurement Special Report in 2014.²⁸ These papers relate to the 2004 Public Sector Directive following which Directive 2014/24/EU was introduced to make the procurement rules less complex. I cover in Chapter 3 the areas in Directive 2014/24/EU which were intended to modernise the rules and make the new rules less complex by simplification and flexibilisation.

The complexity of the procurement rules led to both a lack of understanding on the part of public bodies as to their obligations and a failure to properly implement the rules and practices resulting in poor and inadequate processes and litigation. This in fact was the case in all parts of the UK as supported by challenges and cases brought by aggrieved bidders

²⁴ European Commission, Public Procurement <<https://ec.europa.eu/growth/singlemarket/public-procurement-en>>2018

²⁵ Institute for Government: Government procurement – The scale and nature of contracting in the UK (Gowling WLG 2018) 2

²⁶ Local Government Group, Response to Consultations of Office of Government Commerce (OCG) (Review of Public Procurement Directives 2011) 2

²⁷ United Kingdom response to the European Commission Green Paper on the modernisation of EU procurement policy, COM (2011) 15 final - Unclassified

²⁸ House of Commons, Public Administration Select Committee (PASC) – Government Procurement: Government Response to the Committee’s Sixth Report of Session 2013-14 (Stationers Office Ltd 2014) 51.

against procuring entities. There is a growing body of case law in the UK and the EU, particularly in relation to the three areas listed by one commentator.²⁹

- Disclosure and application of selection and award criteria.
- Clarification of expressions of interest and tenders.
- The establishment and operation of Framework Agreements.

In relation to the matter of selection and award criteria which is one of the main topics covered later in the research, there are a number of cases in the UK courts although the courts accept that contracting authorities have a greater discretion over award criteria. These cases are *Healthcare at Home*,³⁰ *Clyde Solway Consortium v Scottish Ministers*,³¹ *Mears Ltd. v Leeds County Council*,³² *McLaughlin and Harvey v Department of Finance and Personnel*³³ and *J. Varney & Sons v Hertfordshire County Council*.³⁴

Although there is no general obligation to seek clarification of information submitted by candidates or tenderers, the principles of equal treatment and proportionality may operate in respect of the obligation in specific cases. Cases on the substantive matter of clarification are seen in several judgements such as in *Manova*³⁵ and *All About Rights*,³⁶ a series of cases resulting from the award of legal aid contracts by the Legal Services Commission. The matter of a general obligation to clarify an incomplete tender was raised in *Slovensko*.³⁷

In relation to greater transparency in the way that Framework Agreements are used there have been judgements in two cases involving the *Commission v France*³⁸ on this matter. With regard to another question concerning whether contracting authorities which are not a direct party or signatory to a Framework Agreement was the subject of a recent judgement in *Autorità Garante della Concorrenza e del Mercato v Azienda Socio-Sanitaria Territoriale*

²⁹ Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015) 222.

³⁰ *Healthcare at Home Ltd v Common Services Agency* [2013] CSIH 22.

³¹ *Clyde Solway Consortium v Scottish Ministers and others* [2001] CS 15.

³² *Mears Ltd. v Leeds County Council* [2011] EWHC 1031 (TCC).

³³ *McLaughlin & Harvey Ltd v Department of Finance and Personnel* [2008] NIQB 91; [2009] BLR 104.

³⁴ *J. Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB).

³⁵ Case C-336/12 Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S (ECJ, 10 October 2013).

³⁶ *All About Rights Law Practice v Legal Services Commission* [2011] EWHC 964 (Admin)

³⁷ Case C-599/10 SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie (ECJ, 29 March 2010).

³⁸ Case C-340/02 *Commission v France* [2004] ECR I-9845 and Case C-299/08 *Commission v France* [2009] ECR I-11587.

della Vallecamonica.³⁹ On the matter of disgruntled bidders challenging the award of a Framework Agreement, there is the case of *McLaughlin and Harvey v Department of Finance and Personnel*⁴⁰ which covered disclosure of award criteria in respect of a Framework Agreement and setting aside a Framework Agreement.

The matters contained within my research are important both to public procurement practitioners and also procuring entities especially with their obligations to offer value for money and to meet public auditing constraints which have in the past highlighted poor and unnecessary expenditure of public funds by the UK Government. There have been problems in implementing reforms including ineffective governance strategies, incomplete data and weakness in contract management and a Reform Strategy was recommended by the National Audit Office.⁴¹ In 2019 following failures and collapses of a number of high profile suppliers such as Carillion, the Cabinet Office and the UK Government Commercial Function published an Outsourcing Playbook.⁴² This document provided supplementary guidance to improve outsourcing practices in central government. Following the publication of The Outsourcing Playbook a Report was prepared to build on areas of the Playbook seeking to identify gaps in those areas. The Report⁴³ further considered how the gaps identified could be bridged and then focused on key areas for improvement.

The research is becoming more important as I have seen in my role as a public procurement practitioner. I have found in practice when advising on lack of understanding of contract award criteria and the operation of Framework Agreements especially Call-offs from Framework Agreements that knowledge and assistance is required to fill a gap in understanding and the practical aspect of delivery in a professional manner of public procurement. There has been some recognition of the need to define a policy for the professionalisation of public procurement, albeit only in 2017 by the publication of a

³⁹ Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice Soc. coop. arl v Azienda Socio-Sanitaria Territoriale della Vallecamonica - Sebino (ASST) and Others (ECJ, 19 December 2018).

⁴⁰ *McLaughlin & Harvey Ltd v Department of Finance and Personnel* [2008] NIQB 91; [2009] BLR 104.

⁴¹ National Audit Office, *Improving government procurement*. Report by the Comptroller and Auditor General, Cabinet Office 26 February 2013 p9 and 10

⁴² Government Commercial Function, *The Outsourcing Playbook* Central Government Guidance on Outsourcing Decisions and Contracting 2019

⁴³ Joshua Pritchard & Rose Lasko-Skinner, *Please Procure Responsibly, The state of public service commissioning* (Reform Research Trust 2019)

European Commission Recommendation.⁴⁴ This recommendation is accompanied by a European Staff Works Document which contains a Toolbox of good practice. The European Commission Recommendation contains nine recommendations aimed at increasing the overall professionalism of staff of contracting authorities and other entities.

The knowledge from my research which is based on the use and operation in practice of the new rules will also be applied to develop a training programme and toolkit for use in my practice but to publish as a guide to foster knowledge in practice and to provide a better understanding with technical support to practitioners covering the complete public procurement process.

1.3 Research Aims, Objectives and Research Questions

1.3.1 Aims of the research

To identify whether the EU Procurement rules contained within Directive 2014/24/EU transposed into Public Contracts Regulations 2015 which were modernised and drafted to be simpler and more flexible in use are understood by practitioners, namely Procuring Entities and Procurement Consultants / Legal Advisers. To understand this aim I intend to undertake an analysis in Chapter 5 of the thesis with the four selected topics referred to in Chapters 3 and 4.

1.3.2 Objectives of the research

There is literature covering public procurement law which provides detailed analysis of black letter law. This does not however examine the impact of the laws in practice by users of the procurement process. There is therefore a significant gap and the objective of this thesis is to address this oversight by making available in scholarship the unique perspectives of procuring entities and consultants and legal advisers.

⁴⁴ European Commission, Commission Recommendation on the professionalisation of public procurement – Building an architecture for the professionalisation of public procurement SWD (2017) 327 final

1.3.3 Research Question

Have the procurement rules in Directive 2014/24/EU simplified and improved the public procurement process?

To investigate the research, several supplementary questions were defined to structure the information and data gathering process to show how the new rules are operated by practitioners. These supplementary questions were designed to gain valuable information in key highlighted and focused areas. The structure of the three supplementary questions not only capture valuable data for the main research question and specifically cover the four questions selected for my research but form a base for the Questions in the Interview Guide. These Supplementary Questions are:

1. Review of the rules and to consider how they have been modernised to simplify and make more flexible the procurement process in practice in respect of the four selected topics for my research.
2. To understand how Contracting Entities and Procurement Consultants / Legal Advisers apply the rules in relation to the four topic areas based on a series of questions set out in an Interview Guide.
3. Have the new rules on the four areas which are the focus of the research resulted in an improvement in the approach of Contracting Entities and Procurement Consultants / Legal Advisers when undertaking public sector procurement?

1.4 Literature Review

I have structured this literature review into a number of sub-sections as follows

1.4.1 Literature on Public Procurement Law

I have reviewed in this section some of the main contributors on the subject areas which have afforded particular attention for my research.

Within Volume 1 of the Third Edition of the book *The Law of Public and Utilities Procurement – Regulation in the EU and UK*⁴⁵ Arrowsmith provides a comprehensive and structured analysis of the law of public and utilities procurement. Arrowsmith primarily refers to EU Directives and EU jurisprudence but does cite UK procurement regulations and law. This Volume covers 2004 Public Sector Directive⁴⁶ and the 2014 Public Sector Procurement Directive⁴⁷ with the 2006 Public Contracts Regulations⁴⁸ as the book was published in 2014 before the transposition of the Public Contracts Regulations 2015.⁴⁹ In relation to policies Arrowsmith comments that public procurement is often used as a tool to promote social, environmental or other non-commercial policies which Arrowsmith refers to as horizontal policies. This book also includes commentary on the four topic areas I have selected, namely selection criteria, contract award criteria, framework agreements and abnormally low tenders although they only relate to the 2014 Directive. Arrowsmith does not however cover the procurement rules in practice and the practical impact on users of either the Directives or the 2006 Public Contracts Regulations. The research that I am undertaking through engagement with practitioners will address this gap by assessing the practical impact of the procurement rules on users.

In Volume 2 of the Third Edition of *The Law of Public and Utilities' Procurement – Regulation in the EU and UK*⁵⁰ Arrowsmith follows on from Volume 1 with a structured analysis in respect of the EU Directives and UK Regulations and also covers the 2014/23/EU

⁴⁵ Sue Arrowsmith, *The Law of Public and Utilities Procurement – Regulation in the EU and UK* (3rd edn, Vol 1, Sweet & Maxwell, 2014).

⁴⁶ Parliament and Council Directive 2004/18 (OJ 2004 L134/114) on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts.

⁴⁷ Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18 [2004] OJ L94/65.

⁴⁸ Statutory Instrument (SI 2006 No. 5) Public Procurement England and Wales, Public Procurement Northern Ireland.

⁴⁹ Statutory Instrument (SI 2015 No. 102) – Public Procurement.

⁵⁰ Sue Arrowsmith, *The Law of Public and Utilities Procurement – Regulation in the EU and UK* (3rd edn, Vol 2, Sweet & Maxwell, 2018).

Concessions Directive⁵¹, the Concessions Contracts Regulations 2016.⁵² and the 2014 Utilities Directive⁵³ and the 2016 Utilities Contracts Regulations.⁵⁴ These areas do not however fall within the framework of my research. Although there were references to the 2014 Public Sector Procurement Directive⁵⁵ and the Public Contracts Regulations 2015⁵⁶ there is also reference to my topic areas, often in relation to other Directives and Regulations but again the practical application of the rules is not covered. Within this volume Arrowsmith sets out mechanisms for implementing horizontal policies and refers to these policies, with specific reference to the implementation through award criteria which I have included in my research.

Within a book entitled *Reformation or Deformation of EU Public Rules*,⁵⁷ Ølykke and Sanchez Graells set out a critical assessment of the reforms to the EU public procurement rules. These authors also act as editors of a number of sections within the book which discuss how the case law influenced the creation of the new rules in Directive 2014/24/EU. Specific case studies are provided within the book to identify many of the reforms of Directive 2014/24/EU with an assessment of how EU public law was deformed. There are in relation to changes by the EU mention of the policies of social, labour and environmental law but there is no specific reference to horizontal policies or any simplification of the use of horizontal policies in public procurement. Although Ølykke and Sanchez Graells cover several areas of uncertainty in the rules and highlight some covering their operation in practice, the book does not relate to practitioner's interpretation of the rules on a practical platform. In relation to the four topic areas of my research, these areas are referred to in the book but not in use by practitioners. I have drawn information from this book when researching my four topics. The research I am undertaking is a step further and examines the actual operation of practitioners in these four topic areas using empirical methods

⁵¹ Directive 2014/23/EU of the European Parliament and of the Council on the award of Concessions Contracts [2014] OJ L94/1.

⁵² Statutory Instrument 2016 No. 273 – Public Procurement, England, Wales and Northern Ireland – Public Procurement.

⁵³ Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal sectors and repealing Directive 2004/17/EU Utilities Directive [2014] OJ L94/243.

⁵⁴ Utilities Contracts Regulations (SI 2016/274).

⁵⁵ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

⁵⁶ Statutory Instrument 2015 No. 102 – Public Procurement.

⁵⁷ Grith Skovgaard Ølykke and Albert Sanchez Graells, *Reformation or Deformation of EU Public Rules* (Edward Elgar 2016)

(interviews). The book is based on Directive 2014/24/EU but does not cover or refer to the procurement rules in the UK.

In *Modernising Public Procurement : The New Directive*⁵⁸ Lichère *et al* focus on the essence of the changes and reforms to Directive 2014/24/EU and provides an in-depth analysis of most of the provisions in Directive 2014/24/EU. It is stated that the new Directive opens the door to use public procurement decisions as a lever to promote the enforcement of or sanctions the lack of social, labour and environmental law which strengthens the pursuit of horizontal policies. The book covers only three of my selected topic areas, these being selection criteria, award criteria and framework agreements. I have drawn information from this book when researching these topics. The book purely relates to Directive 2014/24/EU and does not cover the PCR 2015 in the UK and further does not examine the actual operation by practitioners of rules which have been changed or reformed.

An accessible introduction with a critical assessment of the impact of Directive 2014/24/EU is made by Semple in *A Practical Guide to Public Procurement*.⁵⁹ The book includes information on the reform process and recent case law and although it provides some information on what the rules mean in practice, there is however, no reference to the operational use by practitioners of the rules in connection with the procurement process. Semple does cover an analysis of the changes and reforms to Directive 2014/24/EU which includes my four topic areas. The book concentrates in the main on Directive 2014/24/EU with no reference to the PCR 2015 in the UK. Semple covers horizontal policies which are said to be economic, social and environmental and mentions that rules have been included in the 2014 Directive to address compliance and enhance the scope of these policies. Semple states that the extent of areas such as social consideration need to be taken into account in procurement within a wider debate.

De Koninck *et al* in a book entitled *European Procurement Law : The Public Sector Directive 2014/24/EU*⁶⁰ provides a commentary on the impact of Directive 2014/24/EU and

⁵⁸ *Modernising Public Procurement: The New Directive*, Francis Lichère, Roberto Caranta and Steen Treumer (eds) (DJØF 2014)

⁵⁹ Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015)

⁶⁰ Constant De Koninck, Thierry Ronse and William Timmermanns, *European Procurement Law: The Public Sector Directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (2nd edn, Kluwer Law International 2015)

an analysis of case law with an insightful overview of the key changes introduced by Directive 2014/24/EU. The book also contains a full text of Directive 2014/24/EU together with an expert analysis of 30 years of relevant jurisprudence. Within the text of the book there is reference to the four topic areas of my research but only with reference to Directive 2014/24/EU. There is no reference to the rules being used by practitioners. In relation to environmental and social aspects, where reference is made to its use as criteria, they must be linked to the subject matter of a public contract with a connection especially in relation to Award Criteria which is one of my topic areas. Under the review of social and environmental policies, there is no reference to these being referred to as horizontal policies or to non-commercial policies. The book does not relate to domestic cases in the UK or the 2015 Public Contracts Regulations.

The European Commission in 2018 published a Guidance document entitled *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.⁶¹ The Guide was prepared with the intention of supporting public practitioners who are responsible with contracting authorities for placing and delivering projects which are funded from European Funds. The document has a status of Guidance but is not an instruction manual on how to comply with the requirements set out in Directive 2014/24/EU. The document from its construction, is said to provide support and is not a substitute for internal rules and regulations. The guide covers and provides advice on all four of my topic areas, these being selection criteria, contract award criteria, framework agreements and abnormally low tenders. Advice is provided in accordance with Directive 2014/24/EU but does refer to the Public Contracts Regulations 2015 (as amended), however there is reference for the practitioner to comply with national legislation and their own rules and processes as well as the EU rules. The guidance aims to offer practical assistance to procurement practitioners to assist them in avoiding common errors in public procurement. These cover a breach of public procurement rules regardless of the stage in the procurement and have an impact on the final results of a public contract with resultant financial costs. Part of the guidance provides proposals for matters to be considered at various stages of a procurement and information on the choice of procedures to be used together with a range of factors to be considered by practitioners.

⁶¹ European Commission, *Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*, February 2018.

Advice is also provided on the main areas within the procurement process but there is no reference to the collectors of data in respect of the various sections included in the Guidance. There is no clear link between the procedures and the most common errors in public procurement, however there is reference to a schedule of the most common errors in the procurement process relating to the EU funded procurements. These common errors it is stated can usually be detected within internal financial controls and audits, reviews of appeals by economic operators against decisions of contracting authorities or audits and checks performed by external bodies. There is reference to an OECD/SIGMA published Brief 29 entitled *Detecting and Correcting Common Errors in Public Procurement*⁶² but there is no clear link to all the areas in the OECD/SIGMA document. The Guidance is dated February 2018, however it does not reflect the latest edition of Brief 29⁶³ which was published in September 2016. Within the Guidance there is said to be a Toolkit, however some of these sections clearly link to the body of the Guidance but the remaining sections are checklists with alternatives to be used for self assessment rather than practical use.

Although the Public Procurement Guidance for Practitioners aims to offer practical assistance to procurement practitioners in connection with projects funded by the European Structural and Investment Funds, it does not extend to the full range of procurement practitioners. There is clearly a gap in knowledge on the application of the rules by practitioners when carrying out the public procurement process. My research aims to fill this gap in knowledge.

From my reading, while there are a few scholarly books covering the EU law, there is a scarcity of literature dealing with the implementation of UK procurement law. In relation to this literature the most noteworthy is perhaps the two books by Arrowsmith. While these books provide a detailed analysis of black letter law, they do not however examine the impact of the laws in practice. There is therefore a clear gap in the knowledge which this thesis seeks to address.

⁶² OECD/SIGMA, Public Procurement Brief 29, *Detecting and Correcting Common Errors in Public Procurement*, July 2013. Available at http://www.sigmaxweb.org/bytopic/publicprocurement/Common_Errors_Public_Procurement_2013.pdf

⁶³ OECD/SIGMA Public Procurement Brief 29, *Detecting and Correcting Common Errors in Public Procurement* 2016.

1.4.2 Public Procurement

This section contributes to the research question by providing a definition of public procurement and some general background especially in relation to several basic requirements of public procurement.

Public procurement has a long history with the earliest procurement order dating from between 2400 and 2800 B.C., the order being for 50 jars of fragrant smooth oil for 600 small weight in grain.⁶⁴ Evidence of cross border international trade at public level is evidenced by the silk trade between China and a Greek colony in 800 B.C.⁶⁵ In the late 1800s in the United States of America state legislators formed boards for purchasing for their own state. In 1810 Oklahoma was the first state to procure centrally for state departments and agencies⁶⁶ and by 1919 many local governments followed this example.⁶⁷

In the UK although there was no specific legislation on public procurement until 1970.⁶⁸ There were however statutes on the prevention of corrupt practices applying to Public Bodies in the public procurement undertaken by such Bodies. Reference to procurement in the UK is made in Chapters 2 and 3 of this thesis.

In the context of the research being undertaken, public procurement refers to an activity of a government or a body governed by public law as defined in EU legislation for the purchasing of goods, works or services which is needed to carry out its functions⁶⁹. Another definition of public procurement refers to the government's activity of purchasing goods, services and works which it needs to carry out all of its functions.⁷⁰ Other systems use a different terminology such as the World Trade Organisation⁷¹ and within the Agreement on

⁶⁴ Charles K. Coe, *Public Financial Management* (Prentice Hall 1989)

⁶⁵ Khi V Thai, *Public Procurement Re-examined* (PrAcadamies Press. 2001)

⁶⁶ Harry R Page, *Public Purchasing and Materials Management* (Heath & Company. 1980)

⁶⁷ Arthur G Thomas, *Principles of Government Purchasing* (Appleton & Company. 1919)

⁶⁸ Local Authorities (Goods and Services) Act 1970.

⁶⁹ Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010) 1.

⁷⁰ Sue Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in S Arrowsmith and A Davis (eds) *Public Procurement Global Revolution* (Kluwer 1998) 3

⁷¹ The World Trade Organisation (WTO) is a global organisation dealing with the rules of trade between nations. The EU is a member of the WTO and all twenty-eight current Member States of the EU are also members in their own right. The European Commission speaks for all EU Member States at the WTO.

Government Procurement, known as the GPA⁷², the system is referred to as ‘government procurement’. The definition ‘Government Procurement’ is also made by the Institute for Government in the UK when reviewing the scale and nature of procurement by the UK Government.⁷³

Within the Public Procurement process there are three phases, these being decision on the goods, services or works to be procured and when, the process of placing a contract and the terms of the contract and then the process of administering the contract to ensure its performance is effective. All three stages need to be closely integrated within the public procurement process.

Trepte has stated that in relation to public procurement it has to be noted that there is a distinction between common law and international systems and civil law systems where contractual terms are more heavily regulated.⁷⁴

It is common practice including for the purpose of laws on public procurement⁷⁵ to divide the categories of procurement as Goods (supplies or products), Works (such as construction) and Services (maintenance, professional, legal or consultancy). These categories have been divided for the purposes of control and regulation.⁷⁶

It is said that public procurement if carried out correctly can play a substantial role in achieving the balance between front line services for citizens whilst making an economy fit for purpose.⁷⁷ Sound public procurement policy brings immediate tangible macroeconomic benefits and the operation of more cost effective procurement allows for a relaxation of budgetary pressure and creative fiscal space.⁷⁸ Public procurement is being increasingly

⁷² The Agreement on Government Procurement is a WTO plurilateral agreement.

⁷³ Institute of Government, ‘Government Procurement – The scale and nature of contracting in the UK’ (Gowling WLG 2019)

⁷⁴ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 18.

⁷⁵ UNICITRAL Model Law on the Procurement of Goods, Construction Services.

⁷⁶ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edn, vol 1, Sweet & Maxwell 2014) 1

⁷⁷ R West, ‘Collaboration can Create Cost Cutting’ (2012) 19 Supply Chain Europe 2

⁷⁸ Lucas Vogul, *Macroeconomic Effects of Cost Savings in Public Procurement, European Countries* (Economic Papers 389 2009)

identified as a means of achieving policy objectives from the reduction of carbon and as a basis of achieving innovation resulting in a more resilient and inclusive economy.⁷⁹

The activity of public procurement is of concern to a wide range of groups and interests. In particular, public procurement affects the taxpayer who funds the government and the citizen or consumer who benefit from the works, services or supplies being procured. In addition, public procurement affects those businesses that supply the works, services or goods and the economy as a whole.⁸⁰

Public procurement in the United Kingdom is governed by EU law which has a great practical relevance and an immediate social impact because it has a clear influence on the design of public services.

Public procurement is important as every year over 250,000 public authorities in the EU spend around 14% of Gross National Product (GDP) which is around €2 trillion per week on the purchase of services, works and supplies.⁸¹

In 2018 the public sector spent a total of £284 billion on the procurement of goods, works and services (including capital assets) which accounted for 33 percent of public sector spending (total managed expenditure).⁸²

The contracting entities in public procurement covered by this study are referred to as ‘Contracting Authorities’ and cover state, regional or local, bodies governed by public law or associates formed by one or more such authorities or more such bodies governed by public law including central government authorities.⁸³

⁷⁹ Abby Semple, *Practical Guide to Public Procurement* (OUP 2015) xxxiii

⁸⁰ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edn, vol 1, Sweet & Maxwell 2014) 2

⁸¹ European Commission, Public Procurement <<https://ec.europa.eu/growth/singlemarket/public-procurement-en>> 2018

⁸² Institute of Government, *Government Procurement – The scale and nature of contracting in the UK* (Gowling WLG 2019)

⁸³ Article 2(1) in Directive 2014/24/EU on public procurement and in Part 1 Definitions 2(1) in the Public Contracts Regulations 2015.

1.4.3 Distinguishing Public Procurement from Private Procurement

This section contributes to my research questions as it indicates many of the requirements of public procurement which should be understood and complied with when undertaking public procurement and further shows the complexity of legislation and the delivery of the public procurement process. The comparison between public and private sectors is made to highlight the demands and external forces which are applied to public procurement which are different in private sector procurement from which a number of the procurement officers of contracting authorities in the public sector were originally trained and had operated.

Procurement has the function in either the public or private sector to manage the sourcing and delivery of goods, services and works through a supply chain in the most cost effective manner.⁸⁴ There are a number of unique aspects of procurement in the public sector which is characterised by the high level of public disclosure which is required to meet the requirements of transparency, openness and availability of information. Public procurement has been described as procurement completed within the context of for-profit organisations and happens with privately owned companies.⁸⁵ This is also known as the private sector.

Walker and Brammer stated that public procurement is a significant and under realised phenomenon⁸⁶, the private sector having more analysis being undertaken especially in relation to purchasing, strategies and tactics.⁸⁷ Although there is a similarity in terms of principles in relation to the acquisition of goods, works and services, they are in fact very different.⁸⁸ It has been suggested that one of the core differences between procurement in the public sector and that in the private sector is the relationship between the parties⁸⁹ with the purchasing power of public sector bodies having an impact on the parties. In both sectors, although there are the requirements of cost reduction or management and achieving value,

⁸⁴ P. Fraser Johnson, Michael R. Leenders and Clifford McCue, *A Comparison of Purchasing, Organisational Roles and Responsibilities in the Public and Private Sector* (2002) 2(1) *Journal of Public Procurement* 57

⁸⁵ S. Surbhi, 'Difference between Public Sector and Private Sector' (26 July 2018)

<<https://keydifferences.com/difference-between-public-sector-and-private-sector.html>> 2018.

⁸⁶ Helen Walker and Stephen Brammer, *Sustainable Procurement Practice in the Public Sector: An International Comparative Study* (University of Bath 2007)

⁸⁷ Kenneth Lyons and Brian Farrington, *Purchasing and Supply Chain Management* (Pearson Education Ltd. 2006) 76

⁸⁸ Louise Knight, Christine Harland, Jan Telgren, Khi V Thai, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge 2007) 16

⁸⁹ Khi V Thai, *International Handbook of Public Procurement* (Taylor and Francis 2009). 176

Walker and Brammer argue that there are differences in practice in the public sector resulting from the additional requirements of achieving social, environmental and other benefits in the procurement structure to meet and fulfil the responsibilities of government to society.⁹⁰

A comparison of public and private procurement has shown that the demands on public procurement are more varied than those in the private sector. The Dutch procurement organisation PIA estimates that 80% of procurement in the public sector is more or less similar to procurement in the private sector, the remaining 20% being very different because of the various demands made upon it.⁹¹

The demands which government and other public sector bodies must meet to become more efficient, practitioners of public sector procurement must focus more on the strategic aspects of public procurement and less on routine transactions.⁹²

There are the different demands that exist in public procurement and which are absent in private sector procurement.

An analysis of the demands which differentiate the public sector from the private sector are as follows:⁹³

1. External demands or forces:

In public sector procurement transparency is a major factor and the procurement procedures and actions of the public sector bodies are governed by the European Union (EU) and in the United Kingdom (UK) by the European Treaty⁹⁴ now known as the Treaty for the functioning of the

⁹⁰ Helen Walker and Stephen Brammer, 'Sustainable procurement in the United Kingdom public sector' (2009) 14(2) Supply Chain Management 128

⁹¹ Louise Knight, Christine Harland, Jan Telgren, Khi V Thai, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge 2007) 17

⁹² Darin Matthews, 'Strategic Procurement in the Public Sector: A Mask for Financial and Administrative Policy' (2005) 5(3) Journal of Public Procurement 388

⁹³ Louise Knight, Christine Harland, Jan Telgren, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge 2007) 17

⁹⁴ The Treaty of Rome 1957 as amended by the Single European Act 1986, the Treaty of Maastricht 1996 – officially known as the Treaty of the European Union (TEU), the Treaty of Amsterdam 1997 and the Treaty of Nice 2001. This Treaty has been amended by the Accession Treaties.

European Union (TFEU), the EU Directives on Procurement and the Public Contracts Regulations in England, Wales and Northern Ireland together with judgements from the European Court of Justice (ECJ)⁹⁵ and domestic courts in the UK.

Other demands put on public procurement relate to integrity, this being where public bodies must carry out that which they promised to do and further not act in a wasteful, corrupt or fraudulent way.

The demands of accountability on the part of public sector bodies and their officers must be paramount in the way that public procurements are constructed with an operating structure which can be explained when queries or questions are raised.

Public sector bodies are expected to set an example in terms of ethical standards and in the way public procurement is operated.

2. Internal demands or forces:

Public bodies and organisations have a duty to service and meet many goals at the same time.⁹⁶ These cover internal goals such as meeting requirements and constraints and serving the public. Many of these goals may well conflict with each other.⁹⁷

Political goals have also to be taken into consideration, however some of these may be of a broad nature and others may well not be clearly defined. In public procurement political goals influenced by elected officials can have many

⁹⁵ Case C-285/99 *Impresa Lombarda SpA v ANAS* ECR 2001 I-9233 para 38, Case C-470/99 *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* ECR 2002 para 91 I-11617.

⁹⁶ J. Gordon Murray, 'Local Government demands more from purchasing' (1999) 5(1) *European Journal of Purchasing and Supply Management* 33.

⁹⁷ Paul R Schapper, João N Veiga Malta and Diane L Gilbert, 'An analytical framework for the management and reform of public procurement' (2006) 6(1) *Journal of Public Procurement* 126.

explanations and often it is not clear in procurement terms what exactly is the use and how to measure against such influences.⁹⁸

The existence of many stakeholders and stakeholder groups, all of which have different objectives to be considered.⁹⁹

3. Demands originating from context

Public sector procurement is budget driven and there are strict expenditure controls which generally cannot be transferred from one fiscal year to another with loss of the budget. Budget details for main sectors of public procurement are open to the general public which can have a resultant relationship change between the procuring entity and suppliers.¹⁰⁰

It has been said that the public sector often has cultural structures with public employees being concerned with public interests resulting in risk aversions and the operation of tedious decision-making processes.¹⁰¹

4. Demands on processes and procedures

Public sector procurement in the UK is currently bound by and has to be undertaken within strict limits imposed by legal rules and regulations, whether it is the EU rules, transposed regulations from the EU rules such as the Public Contracts Regulations or other political choices.¹⁰² These rules and regulations have an accumulative effect and can often be contradictory.¹⁰³

⁹⁸ A. Premehard, *Public Expenditure Management* (International Monetary Fund 1993).

⁹⁹ J. Gordon Murray, 'Local Government demands more from purchasing' (1999) 5(1) *European Journal of Purchasing and Supply Management* 33.

¹⁰⁰ C. Covington, *Return on investment v return for human resources* (The Source 2006) vol 2(3).

¹⁰¹ P. Fraser Johnson, Michael R. Leenders and Clifford McCue, 'A comparison of purchasing's organisational roles and responsibilities in the public and private sectors' (2003) 3(1) *Journal of Public Procurement* 57.

¹⁰² J. Gordon Murray, 'Local Government demands more from purchasing' (1999) 5(1) *European Journal of Purchasing and Supply Management* 33.

¹⁰³ Louise Knight, Christine Harland, Jan Telgren, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge, 2007) 18.

Under the public procurement rules and regulations there are difficulties in establishing and engaging in long term relationships with Suppliers.¹⁰⁴ The rules and regulations provide for competition at all stages which would not be met by long term contracts where other Suppliers are not given an opportunity to tender for the goods, services or works. In public sector procurement the competition requirement allows for co-operation of one public sector body with another. The procurement rules and regulations allow for this co-operative procurement although legal and commercial factors must be considered in respect of each individual procurement being undertaken. It has been said that there are good reasons to enter into a co-operative arrangement, these being both from a commercial point of view and to minimise process and transaction costs.¹⁰⁵

There are public sector controls and audits within the processes resulting from the application of the public procurement rules and regulations. It has been said however that the public sector is both a player and a decision maker in the rules of the game and also a referee.¹⁰⁶

Organisations in the private sector have more flexibility to adopt whatever criteria and controls they consider should be applied to govern the outflow of money to Suppliers. It has been argued that procurement in the private sector has more of a strategic character than that in the public sector.¹⁰⁷

Private and public sector procurement share many of the same objectives such as value for money and following an efficient set of procurement processes. Matters such as the inclusion of social and environmental objectives has been thought to be only in the province of those who procure in the public sector, however this is not the case with Corporate Social Responsibility as the

¹⁰⁴ C. Covington, *Return on investment v return for human resources* (The Source 2006) vol 2(3).

¹⁰⁵ Fredo Schotanus and Jan Telgen, *Implications of a classification of forms of co-operative purchasing* (Proceedings of the 21st IMP Conference, Rotterdam, 2005)

¹⁰⁶ Louise Knight, Christine Harland, Jan Telgren, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge, 2007) 20.

¹⁰⁷ Keith F. Snider, 'Procurement Leadership: From Means to Ends' (2006) 6(3) *Journal of Public Procurement* 274.

private sector has become more focused in promoting both social and environmental objectives.¹⁰⁸

In summary, due to all the demands which are faced by the operation of public procurement by the practitioners of public procurement, public sector procurement is therefore more complex than procurement in the private sector.

This complexity, often driven by strict rules and regulations which are inflexible, has resulted in failures in operation and understanding by users.

5. The environment of the public procurement system

The environment of the public procurement system must be considered.

Khi V. Thai has said that a further factor in relation to public procurement is the ability of a public procurement system to meet and accomplish policies and goals and therefore is influenced by an environment.¹⁰⁹ The factors cited in support of this proposition are:

- Market factors including the maximisation of competition
- The internal environment
- The legal environment and framework
- The political environment
- Social, socio-economic and environmental factors

¹⁰⁸ Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010).

¹⁰⁹ Khi V Thai, *Public Procurement Re-examined* (PrAcadamies Press, 2001) 32

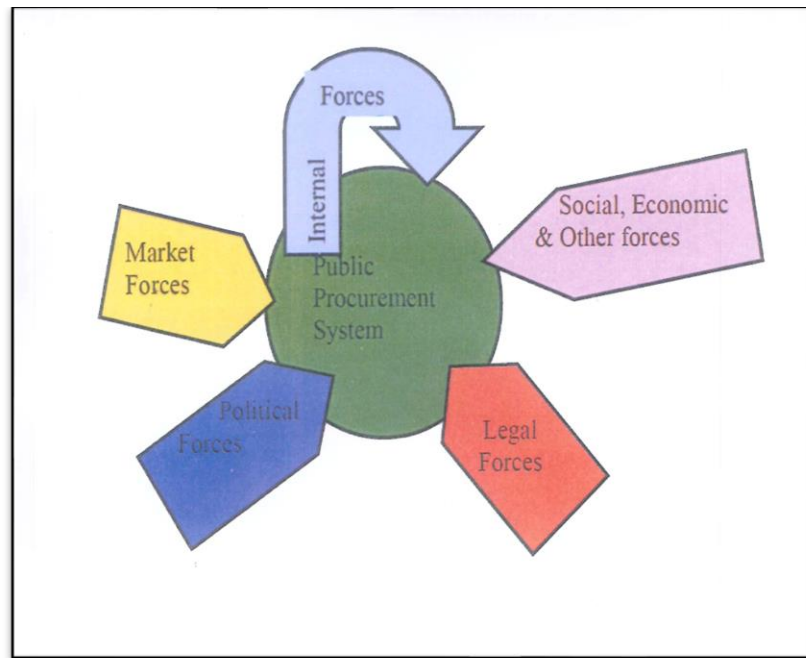


Figure 1.1 The Environment of the Public Procurement System¹¹⁰

The model covering the environment of public procurement systems was initially founded upon the Public Procurement Framework operated in the USA, however the factors stated can apply to most public procurement systems although some countries such as the USA have a greater legal environment with hard law with statutes and regulations that govern all aspects of business and public procurement activities as compared with other countries that have less hard law with soft law applications, examples being the UK and EU systems although the regulation operated by the UK and EU are still complex and inflexible.

A further difference between public sector and private sector procurement relates to the nature of the systems to be operated and the existence of different objectives which then must be considered against the system or systems to be selected to meet the requirements of public sector procurement.

¹¹⁰ Khi V Thai, *Public Procurement Re-examined* (PrAcadamies Press, 2001) 33

It is clear that public sector procurement is more challenging to work with and it should be developed further to deal adequately with the complexities of public procurement.¹¹¹

1.4.4 The objectives of public procurement systems, rules and regulations.

The contents of this section play an important role in the contribution to the research questions as the objectives of public procurement and public procurement systems which should be fully considered in the delivery of public procurement. It is therefore critical that each of the stated objectives and their relationship with each other are understood by all those involved in public procurement and compliance with procurement rules. A failure therefore to understand and apply such objectives can result in poor procurement and a range of factors I have found in practice and which I have cited in Chapter 2.

In practice there are several the objectives of public procurement which have been identified and shared by most of the systems of public procurement. Objectives are implemented through legal and regulatory rules which cover the procedures for conducting public procurement, however the design in drafting such objectives, their interpretation and the method of application have an impact on each other. Practitioners of public procurement often do not understand the rules and regulations and how they relate to each other and their relevance in the construction of particular procurements and systems. Although the public procurement rules and regulations do permit some discretion to be exercised, often problems occur when this discretion is exceeded with an impact on the procurement system being operated.

Several objectives have been identified that are usually shared by public procurement systems and eight of these objectives have been identified by practitioners.¹¹² Although individual objectives may differ according to the actual procurement system adopted, the main eight objectives are:

¹¹¹ Kishor Vadiya, A.S.M. Sajeew and Guy Callender, *E-procurement initiatives in the public sector: An investigation into the critical success factor* (Proceedings of the 13th Annual IPSERA Conference, Catonia. p C325-340, 2004).

¹¹² Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010).

- (1) Value for money also known as efficiency in the procurement of goods, works and services.
- (2) Integrity especially in the avoidance of corruptions and conflicts of interest.
- (3) Efficiency in the actual procurement process being operated.
- (4) Equal treatment and equal opportunities of providers and suppliers.
- (5) The fair treatment of providers and suppliers.
- (6) Accountability at all stages of a procurement.
- (7) Implementation of industrial, social and environmental objectives in the procurement process.
- (8) The opening of public markets to international trade.

Although the eight objectives are generally those found in practice, some commentators adopt slightly different classifications. In this regard Trepte¹¹³ argues that the most identifiable policy objectives are economic efficiencies, promotion of both trade and social objectives and further treats the objective of reducing corruption as an aspect of allocative efficiency although whilst this is an important aspect of that objective, it is not the only one. In support of the proposition that there are three main objectives, Kelman¹¹⁴ has proposed that these objectives should be taken as economic and efficiency, equity and integrity. Similar classifications of objectives have also been adopted and supported by other commentators including Dekel.¹¹⁵

Of the eight main objectives a review and analysis are undertaken as follows:

- (1) Value for money is a major objective in most procurement systems for the acquisition of works, services and goods on the best and most advantageous terms.¹¹⁶ The objective of value for money has also been described as efficiency or economic efficiency.¹¹⁷ Value for money is the main requirement of Governments and has often been used to include social and

¹¹³ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 18.

¹¹⁴ Stephen Kelman, *Procurement and Public Management: The fear of Discretion and the Quality of Government Performance* (AEI Press 1990)

¹¹⁵ Omer Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (37 P.C.L.J. 237 2008)

¹¹⁶ Sue Arrowsmith, John Linarelli and Don Wallace Jr., *Regulatory Public Procurement: National and International Perspectives*. (Kluwer Law International, 2000) 32.

¹¹⁷ Omer Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (37 P.C.L.J. 237, 2008)

environmental goals to meet specific objectives such as the creation of jobs or jobs for disadvantaged people although these issues can also be considered as separate objectives.

The objective of value for money has been said to have three specific aspects.¹¹⁸ This covers ensuring that the works, services and goods are suitable for the requirements in the procurement and are not over specified. Pursuing an arrangement on the best possible terms does not necessarily mean on the lowest price and further that the supplier can provide the goods, works or services on the terms that have been agreed.

To obtain value for money in public procurement has been considered as a legal duty and the National Audit Office and the Audit Commission are respectively responsible for the audit of central government and its agencies in the UK and have developed a definition which was based on economy, efficiency and effectiveness (the 3 E's) which was reflected as a duty for auditors in law.¹¹⁹ It is often described in procurement that value for money is commonly assessed by balancing cost and quality of tenders against the price to be charged under a contract which in turn equates to the cost of the service. This is also reflected in EU procurement objectives.

- (2) An important objective of public procurement regulation and systems is to ensure integrity in the system. Integrity relates to the basis that procurement should be undertaken without any influence of corruption which in turn can cover several practices and forms of collusion between a contracting authority (a government) and a bidder.¹²⁰

There is a close connection between the integrity of the procurement and ensuring value for money, however there are situations where there may be

¹¹⁸ Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010) 6.

¹¹⁹ Audit Commission Act 1998 now repealed under the Local Audit and Accountability Act 2014 in Pt V, cl 20(1)(c).

¹²⁰ Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control makes Government Ineffective*. (University of Chicago Press 1996)

conflict such as use of procedures which allow negotiations with a particular tenderer which is not permitted by the procurement rules.

Corruption can occur in the awarding of contracts not only based on bribes but to bidders where an officer has some interest. There in procurement systems clear rules and guidelines which state the practices which are not acceptable. It should be noted that in certain countries small gifts between those in the business transaction could be regarded as expected or general trading practices rather than corruption.

Corruption can cover several types of practices such as:

- Based on bribes or financial incentives
- To suppliers in which one has a personal interest
- To suppliers in which one's friends, family or business acquaintances or colleagues have an interest
- To political supporters which can cover organisation which have provided financial support or assistance or to regions where a political party has received votes or an influencing support.

Public procurement is one of a government's activities that is most vulnerable to corruption.¹²¹ This is because of the number of transactions and the large range of stakeholders. In addition to bribery as a corrupt act, there a significant number of corrupt risks which result from conflicts of interest in decision making which it is said in turn distort the allocation of resources.¹²²

Other areas of corruption which can have an undermining impact on a public procurement process are cartelism and bid rigging and this can occur at both national and sub-national levels.

¹²¹ OECD: Preventing Corruption in Public Procurement (2016)

¹²² European Commission Report from the Council and the European Parliament – EU Anti-Corruption Report (2014)

Arrowsmith has argued¹²³ that preventing corruption is often given a higher priority than it deserves and as a result new measures are put in place which in turn do not address the problem and often have more disadvantages with their impact on the objectives.

A measure to help to ensure the integrity of a procurement system is to consider the matter of transparency which in turn promotes accountability and ensures access to information.¹²⁴

(3) Efficiencies in the procurement process.

This is an important goal and requires that the procurement system is carried out without unnecessary delay or a waste of resources by the entity undertaking the procurement and also to ensure that the bidder does not incur unnecessary costs.

Where a procurement is efficiently operated then good suppliers may be willing to take part in the procurement leading to value for money. In turn the selection of the procurement procedure by a procuring entity which has been properly justified complete with developed requirements clearly defined and produces a competitive and transparent procedure all add to the efficiency of the procurement. The procuring entity should also have prepared clear and concise tendering documentation which have been prepared by experienced and qualified practitioners.

The UK government originally had the OGC¹²⁵ to deliver efficiencies and savings on behalf of taxpayers and further to have responsibility for many aspects of public procurement. Following the disbanding of the OGC these responsibilities including efficiencies in procurement now rests with the Efficiencies and Reform Group of the Cabinet Office. The Group's activities

¹²³ Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010).

¹²⁴ OECD: Preventing Corruption in Public Procurement (2016)

¹²⁵ Office of Government Commerce which was an independent office within the UK Treasury created in 1999 but disbanded in 2011.

take a role in the development of procurement skills for central government and issues legal rules in relation to procurement including those of the EU.¹²⁶ In a Report on the Efficiencies and Reform Group (ERG)¹²⁷, the National Audit Office examined the overall role of ERG and highlighted a number of weaknesses and made recommendations. The efficiency of procurement was not highlighted and there were several areas that required improvement.

It has been said that the public sector should collaborate with the private sector as the private sector should and would beat the public sector if they were competing to deliver a service in terms of efficiency and creativeness.¹²⁸

(4) Equal treatment and equal opportunities of providers and suppliers

Equal treatment is a fundamental principle of EU law.¹²⁹ This principle is linked to that of non-discrimination in EU procurement regimes and in the WTO Government Procurement Agreement (GPA) under Article IV of the GPA. Equal treatment must also be linked to equality.

It has been argued that equal treatment can be considered to achieve other objectives in the public procurement system.¹³⁰ These objectives also cover competition, preventing corruption and obtaining value for money. The competition objective provides a basis for all interested suppliers being given an opportunity to participate. Dekel has argued that ‘equal treatment not only supports other procurement objectives but also serve as an objective in its own right’.¹³¹

¹²⁶ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the UK and EU* (Thompson Reuter 2014)

¹²⁷ The National Audit Office Report on the Efficiency and Reform Group of the Cabinet Office (The Stationery Office 2013).

¹²⁸ Jeremy Brim, *YPO World Conference of Procurement* posted by Lucy Patchett in Procurement Public Sector. www.cips.org/en/supply-management/news/2019/july

¹²⁹ Joined cases of Commission-21/03 and Commission-34/03 *Fabricom SA v Belgium* ECR 2005 p. I-1559.

¹³⁰ Sue Arrowsmith, ‘Public Procurement: Basic Concepts and the Coverage of Procurement Rules’ in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010)

¹³¹ Omer Dekel, ‘*The Legal Theory of Competitive Bidding for Government Contracts*’ (37 P.C.L.J. 237 2008)

It has been argued that there is a conflict between the objective of equal treatment and other objectives¹³² in such areas as the selection of tendering procedures where in some forms of tendering such as selective tendering, there is only a limited number of suppliers permitted to tender. The selection and understanding of which form of tendering procedure is to be adopted is an important matter.

The principle of equal treatment in the EU procurement terms was articulated in the case of *Storebaelt*¹³³ and then defined in the case of *Fabricom*¹³⁴ as “.....the equal treatment principle requires that comparable situations must not be treated differently and that different situations must be treated in the same way unless such treatment is objectively justified”.

(5) The fair treatment of providers and suppliers

The fair treatment of providers and suppliers is often taken as a separate objective, however some of the rules and procedures which relate to fair treatment may in turn support or assist other objectives such as value for money and procedural effectiveness.

In public procurement the fair treatment extends to procedural fairness such as suppliers having the right to have their case heard before a decision is reached that could adversely affect them and further have the right to know the reason for such decisions. In EU/UK procurement rules there are clear provisions for fair treatment and action that could be taken in the event a contracting authority fails to meet the stated obligations.

Fair treatment will encourage suppliers to participate but those who operate the public procurement systems need to understand this objective and its consequences if not properly addressed throughout the procurement system.

¹³² Sue Arrowsmith, ‘Public Procurement: Basic Concepts and the Coverage of Procurement Rules’ in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010)

¹³³ Case C-243/89 Commission v Denmark

¹³⁴ Joined Cases C-21/03 and C-34/03 *Fabricon v Belgium*

(6) Accountability at all stages of a procurement

Accountability is an important objective in public procurement and any system should have in place means for interested parties which can include the tenderers and the general public to establish whether the contracting authority is fully meeting its obligations.

The objectives and the rules of a procurement system should be monitored and further enforced by the principle of transparency. Contracting authorities and their officers should therefore be accountable for the efficiency and legal and ethical manner in which they conduct public procurements. There should be procedures in place so that public procurement practitioners should be able to explain at all times through an accountability structure why they have made or failed to make decisions and the contracting authority should review their procedures and systems at all stages of the procurement process especially where there are failures and breaches of the procurement rules, regulations and systems.

(7) Efficient implementation of industrial, social and environmental objectives in the procurement process

Procurement may be used to achieve policies which go beyond the procurement of services, goods or works. The promotion of government objectives to cover industrial, social, environmental or even political requirements are defined as socio-economic or 'horizontal' policies. The implementation of such objectives through the public procurement process may be supportive of other objectives.

There are occasions when the implementation of horizontal policies will involve either a conflict with or even a trade-off with other objectives and in turn may result in a procurement becoming more complex and an increase in the procurement procedures.

(8) The opening of public markets to international trade

This objective has been considered as being an important development in public procurement. In the EU the procurement regime has sought to open procurement markets between Members States and other related Countries.

The means for opening markets has required the adoption of transparent procedures for awarding procurement contracts together with the standardisation of procedures for the award process.

In addition, the opening of markets has resulted in corruption and the influence of patronage being addressed which has been assisted by an increase in transparency provisions in the procurement process.

The objectives of opening trade are complimentary with value for money but the relationship between the rules which relate to this and other procurement objectives have found to be complex¹³⁵ which have in turn added to the complexity of public procurement in such instances.

In contrast to the eight main objectives several objectives have been reviewed by several international procurement practitioners which they have linked to stages in the public procurement process. I set out below these findings and the background to the analysis.

The stages in the procurement process were openly reviewed by a number of public procurement practitioners. The IRSPP,¹³⁶ an international research organisation, held a Workshop in 2005 in Budapest following which members, companies, academics and practitioners in public procurement completed a Questionnaire and mapped out the stages of public procurement which had been considered. The stages are:

¹³⁵ Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (University of Nottingham 2010).

¹³⁶ The International Research Study of Public Procurement organisation.

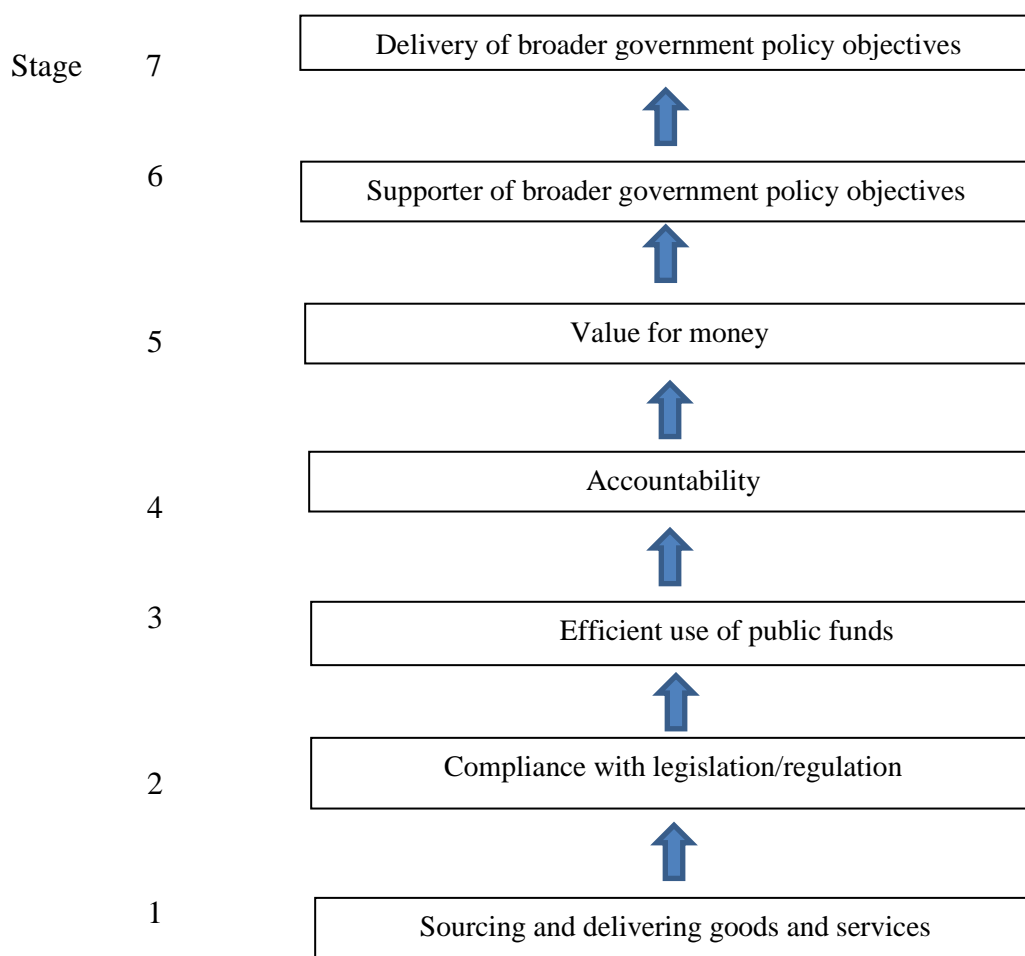


Table 1.1 Seven Stages of Public Procurement¹³⁷

The findings for the seven stages were later the subject of a second survey, this time by public procurement practitioners only. They confirmed the seven stages and set stage priorities which revealed that the highest procurement priorities covering stages 2 – 5 with the priorities relating to policy objectives being considered in this survey at a lower level.¹³⁸ When reviewing the findings which covered the opinions of public procurement practitioners from a wide range of countries including the UK they found that the stage of economic development of a particular country was not aligned to the stage of development of procurement systems although in some less developed countries it was found that there was a need for using public procurement as a lever to drive policy with economic benefits for such policies being extremely important.

¹³⁷ Louise Knight, Christine Harland, Jan Telgren, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge 2007) 352

¹³⁸ Louise Knight, Christine Harland, Jan Telgren, Guy Callender and Katy McKen, *Public Procurement: International Cases and Commentary* (Routledge 2007) 352

In comparing the objectives covered by the IRSPP study against the eight I have covered it is noted that efficient use of public funds as well as value for money and the objective of accountability are listed and the objective of compliance with legislation/regulation is a general heading, the background of which is not specified. The stated objectives do however also contribute to my research questions.

1.4.5 Public Procurement as a policy tool

Public procurement has been constantly used to further public policies in a wide range of fields, however the use demonstrates that public procurement often lacks any strategic maturity.¹³⁹ The use of public procurement as an instrument to promote policies has raised questions and it is said to have an effect on the main objectives of public procurement which in the EU/UK is complex leading to questions being raised as to the actual benefits of the policies which are promoted through public procurement.¹⁴⁰

Where procurement has been used to promote policies such as social environmental or non-commercial, they are referred to in the public procurement structure as ‘horizontal policies’.¹⁴¹ The commercial policies cover supporting SMEs¹⁴², equal opportunities and fair labour controls.

Arrowsmith has argued that that governments use their extensive powers in procurement as an instrument to cover several objectives¹⁴³ and not just in relation to policies. Thai has argued¹⁴⁴ that procurement is a political tool and therefore the origin of all procurement policy is political.

¹³⁹ Jolien Grandia and Joanne Meehan, ‘Public Procurement as a policy tool using procurement to reach desired outcomes to society’ (2017) 30(4) *International Journal of Public Sector Management*

¹⁴⁰ Yusser El-Gayed, *The Influencing Factors of Public Procurement Policy Development: The Case of Libya* (University of Salford 2013) 17

¹⁴¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (Sweet & Maxwell 2014) 9

¹⁴² SME – Small and medium size enterprises defined in EU Recommendation 2003/361.

¹⁴³ Sue Arrowsmith, ‘Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard’ (2004) 53 *International and Comparative Law Quarterly* 17.

¹⁴⁴ Khi V Thai, ‘Public Procurement Re-examined’ (2001) 1(1) *Journal of Public Procurement* 9

Procurement as a social policy has been operated where a government is seeking to meet the specific needs of certain interest groups such as small suppliers. This has taken place in the United States of America (USA) in order to ensure a share of the market for all small and minority businesses through reservation and supply side schemes. In the USA several policies in this regard are supported by legislation¹⁴⁵ and specialist government institution have been established.¹⁴⁶

In comparison to the USA, the European Commission issued a Green Paper in 1996 on public procurement which covered several policy issues including setting in place policies and measures to remedy disadvantages found by SMEs in member states. Policy reviews for better participation by SMEs in public procurement within member states were published.¹⁴⁷ In the UK to confirm a policy change in public procurement a guidance was issued¹⁴⁸ which mainly covered SMEs but also included efficiency proposals for the deliverance of public procurement. Policies for SMEs and their impact on procurement were included in a Report.¹⁴⁹ Many of the policies contained within the Report are now included within the latest Procurement Regulations¹⁵⁰ applicable to England, Wales and Northern Ireland.

In the USA where federal policies are important in economic terms, there are incentives to suppliers to buy American products or produce their own goods and services for the federal government.

In the EU a Report commissioned by the President of the European Commission¹⁵¹ has as one of its key recommendations the need to make public procurement work for policies such as innovation, social inclusion and the growth of green elements by imposing specific mandatory requirements. Within the Report there were recommendations to harness public

¹⁴⁵ The Small Business Act (1953) together with the Small Business Reauthorisation Act (1997) codified and amended at 15 USC Section 644(j)

¹⁴⁶ Small Business Administration (SBA) which is an agency of the US Federal Government with its primary business being to promote small businesses in the US economy. This role was extended in 1978 to permit the SBA to review legislation and testify to Congress on behalf of small businesses.

¹⁴⁷ European Council, European Charter for Small Businesses (2000) and Commission Communication 'Think Small First - A Small Business Act for Europe. Com (2008) 394 final.

¹⁴⁸ OGC and SBS, Small supplier, better value? The value for money that small firms can offer (2006) and ODPM (Office of Deputy Prime Minister) 'Small Business Friendly Concord' (2006)

¹⁴⁹ Cabinet Office: Making Government business more accessible to SMEs – One Year On (2012)

¹⁵⁰ Public Contracts Regulations 2015

¹⁵¹ Mario Monti, *A new strategy for the Single Market at the Service of Europe's Economy and Society* – A Report to the President of the European Commission José Manuel Barroso (2010)

procurement for Europe's policy goals and a call for a full review of public procurement policies leading to a greater integration of all horizontal policy objectives into public procurement. It is further proposed that not only is the review of policies well warranted, it could lead to a simplification and modernisation of the public procurement rules.

The Court of Justice of the European Union (CJEU) has in several judgements acknowledged that a contracting authority may consider criteria relating to environmental protection or social considerations. It was confirmed by the CJEU in two cases¹⁵² that contracting authorities could take into consideration environmental conditions. Social policies¹⁵³ and non-economic criteria¹⁵⁴ have also been considered by the CJEU.

In view of CJEU case law on award criteria, Recital 1 of the 2004 Procurement Directive¹⁵⁵ indicates the significant expansion of policies to be pursued by the application of the Directive by the clarification of the possibility for contracting authorities to use and link social and environmental criteria to the subject matter of the procurement. Contracting authorities are still restrained by the fundamental of the Treaty¹⁵⁶ but policy shifts of the Treaty can affect any equivalent broadening of policy objectives which may then be considered in the field of public procurement.¹⁵⁷

In Directive 2014/24/EU¹⁵⁸ an opportunity is offered for sustainable procurement to become more mainstream.¹⁵⁹ The environmental and social provisions still remain optional for contracting authorities to implement. There is however in Directive 2014/24/EU an ability to request evidence of environmental measures and management to cover supplies contracts.

¹⁵² Case C-513/99 *Concordion Buses Finland v Helsinki Municipality* ECR 2002 p. I-7213 and again in Case C-448/01 *EVN Applicant Group and Wiestrom GmbH v Republic of Austria* ECR 2003 p. I-14527

¹⁵³ Case C-225/98 *Commission v France* ECR 2000 p. I-7445

¹⁵⁴ Case 31/87 *Gebroeders Beentjes BV v Netherlands* ECR 1998 I-4625.

¹⁵⁵ Public Sector Directive – Parliament and Council Directive 2004/18 [OJ 2004 L134/114] on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts

¹⁵⁶ The Treaty of Rome 1957 as amended by the Single European Act 1986, the Treaty of Maastricht 1992 officially known as the Treaty on European Union (TEU), the Treaty of Amsterdam 1997 and the Treaty of Nice 2001. Following the Lisbon Treaty in 2007 the TEC was renamed as the Treaty on the Functioning of the European Union (TFEU).

¹⁵⁷ Peter Trepte, *Public Procurement in the EU – A Practitioner's Guide* (2nd edn, 2007) 4

¹⁵⁸ Directive 2014/24/EU of the European Parliament and Council of 26 February 2014, on public procurement and repealing Directive 2004/18/EC

¹⁵⁹ Abby Semple, *Practical Guide to Public Procurement* (OUP 2015) 171

The provisions in Directive 2014/24/EU lean more towards life cycle methodologies together with technical specifications and award criteria.

EU procurement policy has curtailed the scope for horizontal policies in domestic procurement and policies must be carefully drafted to meet EU law requirements. In the 1980s the UK government adopted some legislation to prevent local authorities using public procurement for non-commercial policies.¹⁶⁰ This provision remained in place until it was modified by subsequent domestic legislation. In 2012 the UK introduced legislation¹⁶¹ which placed a duty on public authorities in relation to economic, social and environmental well-being in connection with public services contracts. The Act requires commissioners of procurement to consider social value at pre-procurement starts and consider how what is to be procured may improve social, environmental and economic well-being of the relevant areas applying to the procurement process.¹⁶² The Act relates to the public procurement covered by the Public Contracts Regulations and states that contracts for goods and services are not covered by the provisions of the legislation. In practice however the Act has been applied to procurement of goods and services and recommendations are being put in place to permit a wider context to the Act as it is said that social value is essentially about getting more value for money and can be a tool for smarter procurement.¹⁶³ The application in practice of the requirements set out in the legislation has added to the complexity of the procurement process especially in the evaluation of responses in Tender documents.

1.5 Methodology

1.5.1 To address the research questions and to meet the aims of my research the following methods will be operated:

- (1) A black letter / doctrinal analysis of relevant laws in order to compare and analyse the past and present legal frameworks on the subject.

¹⁶⁰ Section 17 of the Local Government Act 1988

¹⁶¹ Public Services (Social Value) Act 2012

¹⁶² Cabinet Office, Procurement Policy Note: The Public Services (Social Value) Act 2012 – Advice for Commissioners and Procurers. Information Note 10/12 (December 2012)

¹⁶³ Cabinet Office, Social Value Act Review (2015)

- (2) However as black letter law methodologies do not capture the application of the law in practice this doctrinal analysis will be supplemented with an empirical interview methodology to capture the perceptions of practitioners, especially in relation to the four topic areas selected from the changes and reforms in Directive 2014/24/EU. Detailed explanation of the methodology used for the interviews is provided in Chapter 4.

1.6 The structure of the thesis

The thesis is presented in six chapters. Chapters 1 to 3 set out the context for the research whilst Chapters 4 to 6 focus on the empirical study which provides the main contribution for the project.

A brief summary of the chapters in the thesis are as follows:-

Chapter 1 covers the introduction to the thesis.

Chapter 2 contains the context and foundation of my research in relation to public procurement in practice, a background and introduction to public procurement including an historic overview together with a review of the 2004 Directive and the 2006 Public Contracts Regulations.

Chapter 3 focuses on information on the four topics selected from the changes, modifications and reforms to Directive 2014/24/EU for the empirical research included in Chapters 4 and 5 of the thesis, a review of Directive 2014/24/EU which was transposed into the Public Contracts Regulations 2015 highlighting key reforms and modifications to the procurement rules.

Chapter 4 explains the methodological approach and research design which was embraced for undertaking the empirical research together with the rationale for the choice of action adopted and undertaken.

Chapter 5 presents the empirical findings of participant's perceptions and experiences of the modernisation, simplification and flexibilisation of Directive 2014/18/EU in practice in the

four topic areas covered by the Interview Guide. This Chapter also contains an analysis of the findings as to whether the 2014 Directive has modernised, simplified or made more flexible the rules in respect of the topic areas.

Chapter 6 contains a conclusion on the findings of the research.

1.7 The Researcher

I am a public procurement consultant and the principal of my own practice. In relation to the qualifications which specifically cover procurement I have an LLM in Public Procurement Law and Practice from the University of Nottingham, full Membership of the Chartered Institute of Procurement and Supply (Chartered Procurement and Supply Professional), a member of the Procurement Lawyers' Association and I am a Chartered Environmentalist based on Sustainable and Environmental Procurement. I have an MSc in Construction Law and Management from Kingston University; I am a Chartered Quantity Surveyor (FRICS), Fellow of the Chartered Institute of Arbitrators and Member of the UK Association for European Law.

As a public sector consultant, I have on behalf of Contracting Authorities undertaken, managed or advised on over thirty above threshold contracts and Framework Agreements procured under the 2004 Directive / 2006 Public Contracts Regulations. Since the introduction of the 2014/18/EU Directive / 2015 Public Contracts Regulations I have undertaken, managed and advised on in excess of thirty-five above threshold procurements and six below threshold procurement contracts.

All the procurements with which I have been involved cover the categories of supplies, works or services and I have undertaken the procedures of Open, Restricted, Competitive Dialogue and Competitive Procedures with Negotiation. In addition, I have undertaken or managed Call-off Contracts from Framework Agreements and the setting up and delivery of Direct Purchasing Systems.

I have advised on and undertaken reviews of sustainable procurement, lectured and presented on public procurement practice to Contracting Authorities and Supplier Groups including sustainable supply chains. I have also acted as an Expert Witness in Procurement cases and

carried out audits of procurements through all stages of the procurement process. I have undertaken reviews of SMEs in public procurement in the UK and under the Small Business Act 1953 in the USA.

1.8 The journey to a Professional Doctorate

My motivation for selecting to pursue a Professional Doctorate programme was based on several elements especially the direct relevance of the doctorate to professional practice which would enable the subject matter to be transferred to the workplace. The programme would also enable me to acquire further professional experience and knowledge through undertaking my research. Although I have substantial professional experience, I consider that the doctorate would also provide a means of validating knowledge and experience.

I undertook the Professional Doctorate Programme as a part-time candidate in two stages. Stage 1 was the preparation and submission of three written papers of 21,000 words in total. Paper 1 covered issues in professional practice, Paper 2 theoretical perspectives and Paper 3 was an advanced review and Research Proposal. These Papers were assessed and then externally moderated and marked. I achieved a pass in each of the submitted Papers.

Following receipt of the notification that I had successfully completed Stage 1, permission was granted to proceed to Stage 2 which is the preparation of the thesis. I have elected to incorporate the Stage 1 papers in the body of my thesis although many areas of the content had to be updated and changed due to the introduction of the 2014 Directive with its impact, and further case law.

Chapter 2

Context for the research, background to and historical review of public procurement and an overview for background purposes of Directive 2004/18/EC¹⁶⁴ and the Public Contracts Regulations 2006¹⁶⁵

2.1 Section 1 : Introduction

The controls, constraints, rules and regulations applying to public procurement in the EU have radically changed over the last sixty years and are in fact still changing, an example being the publication of the 2014 Directive¹⁶⁶ transposed into the Public Contracts Regulations 2015 (as amended). This has been characterised by the requirements of Governments and specific case law both domestically and subsequently through the European Courts, the need for more understanding by public authorities and suppliers of the rules and regulations, governance and transparency requirements and the need to provide value for money.

This Chapter is divided into a number of sections.

Section 2.1 is this introduction. Section 2.2 covers the context and the foundation of my research which is being undertaken in relation to my experience of public procurement in practice and also confirmation of the lack of understanding of the procurement rules in practice. Section 2.3 contains a background and an introduction to public procurement with a historical overview to show how the rules commenced and were applied. Section 2.4 contains an overview of the 2004/18/EU Directive transposed in the now repealed UK 2006 Public Contracts Regulations.

My research seeks to uncover how the current EU procurement rules in Directive 2014/24/EU and its UK implementing legislation, the Public Contracts Regulations 2015 (as

¹⁶⁴ Parliament and Council Directive 2004/18/OJ 2004 L134/114 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts

¹⁶⁵ Statutory Instrument 2006 No. 5 Public Procurement England and Wales and Public Procurement Northern Ireland

¹⁶⁶ Directive 2014/24/EU of the European Parliament and Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

amended), have sought to improve the public procurement process through an examination of specific themes in the rules including their perceptions and applications in practice by a number of categories of persons who operate the rules in practice. In order to examine the current procurement rules in both the EU and the UK it is important to understand and evaluate the pre-existing rules, hence the need for this chapter which examines the predecessor procurement rules at both EU (Directive 2004/18/EC) and UK (2006 Public Contracts Regulations) levels.

2.2 Section 2 : Context and foundation for the research

2.2.1 The researcher's experience of public procurement in practice

Under public procurement law there are certain rules and procedures that must be followed by contracting entities when undertaking the tendering and awarding of public contracts. In the event that these rules and procedures are not followed then there is a risk that either the contract award can be challenged or challenges are made by Suppliers in respect of resultant breaches of or failures on the part of the contracting authority to comply with the rules.

As will be shown, some of the issues I have identified have also been noted by a number of authors while other issues have arisen directly from my own experience as a Public Procurement Consultant over the last twenty years.

In practice I have found that there are a range of failures on the part of contracting entities in the UK to comply with both the requirements of the Public Contracts Regulations 2006¹⁶⁷ and now the Public Procurement Regulations 2015 (PCR 2015)¹⁶⁸. There are also the procedural aspects of the procurement process which have not been followed for public contracts and in this regard research should be undertaken to ascertain why they have occurred and also their consequences on the part of contracting authorities. I have found that in practice some of the failures and lack of understanding fall into the following areas.

¹⁶⁷ Statutory Instrument 2006 No. 5 - Public Procurement England and Wales and Public Procurement Northern Ireland

¹⁶⁸ Statutory Instrument 2015 No. 102 – Public Procurement

Lack of understanding:

- an initial non-acceptance that the EU rules apply to a specific type of activity and also to the contracting authority.
- as to whether the EU rules apply to the contract being entered into by the contracting authority.
- in the operation of the aggregation rules deciding whether the combined value of a number of contracts is over the threshold for the EU procurement regime.
- in England and Wales, the Regulations specifically relating to below threshold procurements including Chapter 8 in Part 4 of PCR 2015.
- in the selection of the procurement route leading to elongated procurements. This being in respect of the EU procurement procedure to be followed i.e. open, restricted negotiated or competitive dialogue.
- as to whether a Contract or a Framework Agreement would provide the best, most efficient and value for money procurement route.
- to understand the processes to apply in respect of dealing with Abnormally Low Tenders.
- of the requirements to inform all suppliers of the reasons for their failure to be awarded a contract or in the case of a Framework Agreement to become a party to the Framework Agreement.
- Amendments being allowed by contracting entities to tenders resulting in unequal treatment of all the Bidders.

Failures:

- as to whether the contract is for public works, services or supplies or if a contract is outside the EU procurement regime i.e. below the thresholds set by the rules.
- to understand whether the EU procurement rules apply to a public contract i.e. for a Part B services contract under PCR 2006.
- to provide sufficient resources of experienced and capable staff involved in the procurement covering both senior and internal support team members.

- to undertake sufficient preparation and planning of the procurement with the official contract notice for the procurement being made too quickly before the initial documentation is complete.
- to understand and compliantly operate the pre-qualification and selection procedures, the award criteria, and then the evaluation and assessment of Tenders.

As part of my research I have selected four of the above stated topics to review in detail in relation to the new procurement rules which have been said to have been modernised, made simpler and more flexible in the procurement process. The basis for selecting the four topics is explained and justified in Chapter 3 of this thesis. These topics are Selection Criteria, Award Criteria, Framework Agreements and Abnormally Low Tenders. I have referred to these four topics in the list above either as lack of understanding in operation or failures to follow processes.

I have in practice experienced the lack of understanding or interpretation of the rules, many of which occasions have resulted in failures and breaches. Some of the failures to follow the rules were repeated on individual procurements and also repeated in other public procurements for the same contracting authority. I consider that there is a need to understand why there is a lack of understanding and interpretation of the rules in practice by contracting authorities.

It is the intention that the study will assist me in my practice as a Procurement Consultant specialising in public procurement especially when advising Clients who are contracting authorities.

2.2.2 Understanding public procurement in practice in the UK

The complexity of the EU Procurement Directives transposed in the UK in the Public Contracts Regulations and the understanding of these rules has led to failures to fully operate the procurement rules, a fact which has for some time been recognised by all procurement practitioners and users in the Public Sector. Although Regulations on public procurement have been prepared, details of which are set out below, there are generally very few

references to any detailed analysis of the procurement process or lessons learnt for application in practice. In addition, references to EU public procurement rules are also limited.

A Report¹⁶⁹ on Local Government in England was published by the Office of the Deputy Prime Minister in late 2003. There was reference to lessons learnt from procurement projects and the need to carry out a public procurement skills audit to ascertain training and reskilling. In practice there is no evidence to confirm whether all or any of the recommendations were accepted and implemented either by Local Government or at Central Government level.

Recognition of failures and a need to improve public procurement processes was covered in 2004 by a Report from the now defunct Office of Government and Commerce (OGC) which was part of the Cabinet Office. The report contained a number of recommendations but did not, however, review previous challenges or lessons learnt structures for improvement of procedures in practice or any skills deficiencies which were needed to be addressed.

In 2007 a Treasury¹⁷⁰ review of public procurement was undertaken, the findings of which emphasised and confirmed a Cabinet Office document¹⁷¹ that to achieve good results was through a focus on outcomes rather than rigid rules. This Treasury report resulted in the formation of the Government Procurement Services Skills Framework. These reviews, reports and initiatives were all seeking to obtain value for money in the public sector and not to improve public procurement in practice.

The complexity of the public procurement rules together with wasteful procurement practices and the lack of understanding of the rules and in the operation of public procurement in practice was still not addressed. These areas were however recognised as being a subject of concern in 2010 by the Cabinet Office who announced that a Lean Review of public sector procurement would be undertaken. The findings and results of the Lean Review were published in 2011 by the Cabinet Office.¹⁷² The review found a number of critical areas relating to the lack of understanding of public procurement rules and processes, these being:

¹⁶⁹ Office of the Deputy Prime Minister, Report on Local Government in England, November 2003.

¹⁷⁰ H.M. Treasury, *Transforming Government Procurement* (January 2007)

¹⁷¹ Cabinet Office, *Making a Difference: Reducing Bureaucracy in Central Government*. (2003)

¹⁷² Cabinet Office, *Results of Lean Review* (London, February 2011).

- insufficient capacity of capable and well-trained senior procurement resources
- lack of pre-procurement planning and transparent purpose
- the OJEU process is commenced too quickly with insufficient preparations
- poor selection of procurement route leading to elongated procurements with additional time involvement and cost for both the contracting entity and the Supplier
- too much variation and confusion over different terms in the procurement rules

Although the Lean Review related in the main to central government, the critical issues found confirm my findings in practice which still exist in relation to other public sector contracting entities. The Review made a number of proposals to rectify the critical areas highlighted including training and management. The matter of waste and inefficiency in procurement processes was not clearly addressed.

In 2011 in a Report *Why Public Procurement is Critical to the UK Economic Performance and how to transform it*,¹⁷³ Hughes and Day found from their research that a large number of Buyers in the public sector who undertake the procurement of public contracts had not been trained in public procurement or in fact in procurement. This resulted in large spending decisions being made by staff that had no previous training in public procurement leading to mistakes being made and long delays occurring to the contract award process. Whilst there was reference in this Report to training and the need for more public procurement professionals, there was no reference to a lack of understanding of the public procurement process.

The effectiveness in the delivery of public procurement in Wales was also considered in 2012 in a Report following a Review undertaken by John McClelland entitled *Maximising the Impact of Welsh Procurement Policy*.¹⁷⁴ The Report considered procurement landscapes and operating models, constraints affecting operation of public procurement in Wales. Within the recommendations McClelland proposed that there should be an investment in developing the

¹⁷³ John Hughes and Marc Day, *Why Public Procurement is critical to the UK Economic Performance and how to transform it* (Henley Business School/University of Reading and Future Purchasing Consulting Ltd. 2011).

¹⁷⁴ John F McClelland, *Maximising the Impact of Welsh Procurement Policy – Full Report* (Welsh Government 2012).

capacity of the procurement profession for public procurement as findings indicated that there was a question on the actual skill levels and professionalism of procurement staff with less than half of the procurement staff being part or fully qualified. These findings also raised consideration of whether there was effective procurement, lack of control and failure to adopt and implement policy-driven procurement practices and programmes. The gaps found were said to have a likely impact on performance in the procurement process. The Report also referred to the views of contracting authorities that that EU legislation was a major inhibitor and a point of complete inflexibility. McClelland further considered that there may be a misinterpretation of the flexibility of EU legislation and that different approaches could help organisations and their procurement staff in dealing with this challenge. Although training was proposed, there was no specific detailed proposals or references to the review and analysis of earlier public procurements that had been undertaken to consider the use of such findings as lessons learnt to ensure improvements in the procurement systems being operated.

As the UK Government was still concerned about public procurement Sir Philip Green was instructed to undertake an Efficiency Review of government spending focusing on community procurement, property and major contracts. In relation to the public procurement processes, a 2010 Review¹⁷⁵ stated that the Government does not follow best practice in public procurement, procurement data is inconsistent and where there is data it is difficult to obtain for review. There is no reference as to how procurement processes are to be improved or understood from the range of examples of inefficient procurement considered and cited in the review.

Following the Review by Sir Philip Green the Cabinet Office in early 2011 published a Report entitled *Accelerating Government Procurement*.¹⁷⁶ This document also included findings from the 'lean review', published in 2011. Some of the findings covered OJEU procurement processes that had been commenced too quickly without sufficient preparation and planning and that there had been a poor selection of procurement routes and procedures leading to elongated time periods for public procurements resulting in additional costs for both the government and Suppliers. The findings in 2011 do not appear to have been

¹⁷⁵ Philip Green, *Efficiency Review – Key Findings and Recommendations* (Cabinet Office 2010).

¹⁷⁶ Cabinet Office, *Accelerating Government Procurement, Management Summary of the findings of a 'team study' to investigate waste and inefficiency in government procurement proceedings* (London, 2011)

addressed in practice as I have covered earlier in this Section. There was no mention of analysing a selection of public contracts procurement for lessons learnt and training.

In 2013 a Report entitled *Improving government procurement*¹⁷⁷ was issued by the National Audit Office. This Report included an overview of procurement reform strategy to be proposed together with a review of the governance and accountability arrangements in place and a consideration of progress in the implementation of the strategy lead by the Cabinet Office. The Report did not include proposals for the actual delivery of public procurement under the EU rules and the difficulty and complexity of the rules on delivery of public procurement systems. Within this Report there is however reference to an earlier Report entitled *A Review of Collaborative Procurement across the Public Sector*¹⁷⁸ which included a number of recommendations. These included ensuring that procurement management information meets specified standards but there is no detail or the procedures to be operated.

The Commons Public Administration Committee published a Report¹⁷⁹ in 2013 in which the Committee found that despite Government steps to improve the efficiency and effectiveness of Government procurement, the stream of procurement and contract management failures continued unabated and that there were continuous procurement failures due to a persistent lack of skills. Accordingly, major improvements in the Civil Service's capability and skills around public procurement are required to be implemented as there are major shortcomings in the ability of the Civil Service to run effective and efficient public procurement. The findings indicate that there is a consistent lack of understanding on how to gather requirements, evaluate supplier capabilities or to specify the required outcomes. There was, however, no details of how such improvements could be implemented through training or other methods to overcome the complexity of public procurement especially in relation to compliance with EU or domestic public procurement rules and regulations.

In 2014 the Department for Communities and Local Government (now the Ministry of Housing) issued a Procurement Guidance document¹⁸⁰. Within the Report there was some

¹⁷⁷ National Audit Office, *Improving government procurement* (Audit Commission, London, 2013)

¹⁷⁸ National Audit Office, *A Review of collaborative procurement across the public sector* (London NAO/Audit Commission, May 2010).

¹⁷⁹ Public Administration Select Committee : Government Procurement (6th Report of Session 2013-2014 London, Stationery Office 2013).

¹⁸⁰ Communities and Local Government, *Procurement Guidance* (Stationery Office 2014)

recognition of failures to comply with public procurement law. The Guidance set out examples of the most common errors that had been experienced, in particular by the European Regional Development Fund in undertaking public procurement in England. In a Schedule appended to the Guidance stated the type of irregularities and breaches and a rate of correction. The Guidance further states procedures to be followed in the public procurement process but does not cover any analysis of public procurements which have previously been undertaken or have been used to support the advice given.

In 2018 the UK Government's outsourcing policy for Central Government came under intense scrutiny following the collapse of Carillion in January 2018 and ongoing difficulties with other suppliers used for outsourcing works and services. A study was undertaken, and the Government Commercial Function published *The Outsourcing Playbook*.¹⁸¹ The Playbook identified challenges associated with public procurement and scheduled a number of areas for key reforms in the procurement process. Among these reforms were the correct and appropriate design of evaluation criteria, use of Framework Agreements, the selection process and the final evaluation of bids. Although the Playbook recognised key areas for reform it did not mention training or lack of procurement skills as the reason for the action on the reforms highlighted.

An independent Report in 2019 entitled *Please procure responsibly – The state of the public service commissioning*¹⁸² covered skills and expertise which although accepting there had been some results achieved, these needed to be a priority across local and central government to ensure that a basic standard of commercial expertise exists regardless of the public service being commissioned.

¹⁸¹ Government Commercial Function, *The Outsourcing Playbook – Central Government Guidance on Outsourcing Decisions and Contracting* (Cabinet Office 2019)

¹⁸² Joshua Pritchard and Rose Lasko-Skinner, *Please procure responsibly – The state of the public service commissioning* (Reform procurement 2019)

2.2.3 Overview of challenges made by suppliers for failures and breaches on the part of contracting authorities

In relation to breaches of public procurement laws and failures on the part of contracting authorities to comply with the procurement rules, there is limited up to date published information available on challenges brought by suppliers in the UK.

A study¹⁸³ prepared in 2011 examined the number of challenges brought by Suppliers each year between early 1993 and June 2011. The data was initially taken from UK case reports and so challenges / complaints which were either settled out of court or did not reach a hearing were excluded. Further searches were conducted on the Westlaw legal data base and also from data held by the publishers of the study.

The study examined the types of contracting authority which was challenged the most and the areas which were most commonly the subject of the challenges. The success rates of the challenges brought were also noted. One of the aims of the research was to assist procuring entities to identify the possible areas at risk of challenges in their own procurements. The findings in relation to the complaints from Suppliers covered: -

- Award criteria and the evaluation of tenders in the procurement process
- Pre-Qualification and selection criteria
- Amendment of Tenders
- Failures in the application of the correct application of the Public Contracts Regulations
- Breaches of the rules at the evaluation and award stage of public contracts

The results of the study, it was stated, did take into consideration specific remedies reforms introduced in 2009¹⁸⁴ which significantly strengthened the remedy system available to Suppliers for breach of the public procurement rules. The results of the study are said to be provided to assist contracting authorities in future procurements by the provision of the most

¹⁸³ Eleanor Aspey, *Supplier Challenges in the UK* (Achilles Group 2011).

¹⁸⁴ Amendments to the Remedies Directive in 2007 by Directive 2007/66 which was transposed into law in England and Wales by the Public Contracts (Amendment) Regulations 2009 (Statutory Instrument 2011 No. 2053)

common areas that are subject to challenge. The results of this study support many of the findings I have covered in this Section and which relate to my research.

In relation to the evaluation of tenders, there have been two high profile domestic Court cases, these being *Energy Solutions EU Ltd. v Nuclear Decommissioning Authority*¹⁸⁵ and *Woods Building Services Ltd. v Milton Keynes Council*.¹⁸⁶ These cases concerned failures on the part of the contracting authorities to correctly evaluate Tenders leading to redress under the Public Contracts Regulations 2006. The basis of the actions was that a contracting authority had made manifest errors in the evaluation, there had been a lack of transparency in the award procedure and failure of the contracting authority in their duty of equal treatment for all Tenderers. Failures in the assessment of Tenders together with a lack of transparency are matters I have listed in my findings in practice covered earlier in this Section.

Although to date a small number of legal challenges have been mounted in the UK in relation to the new 2015 Public Contracts Regulations, currently there is limited information and data to be reviewed in relation to my research. In relation to one of my topic areas, this being Abnormally Low Tenders, there have been the domestic cases of *J Varney & Sons Waste Management Ltd. v Hertfordshire County Council*¹⁸⁷ and *NATS (Services) Ltd. v Gatwick Airport Ltd.*¹⁸⁸ The latter case concerned a utility but applies equally to a contracting authority.

2.3 Section 3 : Background and introduction to public procurement with an historical overview

2.3.1 Procurement in the United Kingdom (UK) prior to the Public Contracts Regulations 2006 (PCR 2006).

¹⁸⁵ *Energy Solutions EU Ltd. v Nuclear Decommissioning Authority* [2016] EWHC

¹⁸⁶ *Woods Building Services Ltd. v Milton Keynes Council* [2015] EWHC 2011 (TCC)

¹⁸⁷ *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB)(Ch)

¹⁸⁸ *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133 (TCC)

Before implementing in the PCR 2006 the rules and regulations in the EC now EU Procurement Directives, the UK did not have any significant body of public procurement law with rules and controls.

It was common for both public and local authorities to use their power to conduct trading activities including public procurement often referred to as purchasing by virtue of private Acts of Parliament through clauses or adoptive Acts of Parliament.¹⁸⁹ Public authorities often used their power to dominate and use the public character of one of the parties to influence the courts. This was shown in a case in 1873¹⁹⁰ where the Court cited the public character of one party as the grounds for the judgement. The conclusion it was said would not have been the same in the case of private parties.

In an attempt to bring some structure to the purchase of goods and services by Local Authorities and other public bodies The Local Authorities (Goods and Services) Act¹⁹¹ was passed in 1970 which allowed Local Authorities to enter into an agreement for the supply of goods and services by them to certain public bodies. There was however no specific mention of the supply of works. In *R v Yorkshire Purchasing Organisation ex Parte*¹⁹² however it was held that the power did not authorise an authority to provide procurement services for their customers for a commission. The legislation did not however cover any procedures for public procurement systems or their operation.

Additional powers were given to local authorities in legislation in the Local Government Act of 1972¹⁹³ in respect of the discharge of the functions of local authorities together with miscellaneous powers including to the placing of staff of local authorities at the disposal of other local authorities or health authorities. There were however no specific references to public procurement systems for local authorities.

For many years the UK Government has regarded competition in the procurement of contracts for goods, services and works as the paramount mechanism for providing value for money, however the volume of public services to be procured had exposed competition as not

¹⁸⁹ Manchester acquired approval for the maintenance of its gasworks by a private Act of 1834.

¹⁹⁰ *Great Northern Railway v Witham* (1873) L.R.90 p.16.

¹⁹¹ Local Authorities (Goods and Services) Act 1970.

¹⁹² *R v Yorkshire Purchasing Organisation ex Parte*. British Educational Suppliers Association. The Times 1997.

¹⁹³ Local Government Act 1972.

being the best route for public procurement. At that time private sector organisations were invited to tender for local authority contracts by following a competitive tendering methodology, this however was often differently operated in practice by individual authorities and this situation lead to concerns on the part of Government both as to the overall procedure and its benefits.¹⁹⁴ In the 1980s there was a move toward contracting out services to offer either the most efficient way of meeting the needs of Government.¹⁹⁵

In 1980 the Local Government, Planning and Land Act introduced Compulsory Competitive Tendering (CCT) for new construction, building maintenance and some highway work.¹⁹⁶ Further legislation in the form of the Local Government Act 1988¹⁹⁷ imposed CCT on a variety of local government services and the Local Government Act 1992¹⁹⁸ enlarged the CCT provisions to include white collar services. The Act empowered the Secretary of State to regulate certain further elements in the tendering procedures which had been established by earlier legislation including amendments to the 1980 and 1988 Acts. The 1988 Act also contained sections which covered competition and procurement in relation to contracts for the execution of works by local authorities and contracts for the supply of goods and services. A further section to the Act covered ‘non-commercial’ matters being considered by local authorities in their dealings with public procurement contracts and for lists of approved Tenderers. In addition, the Government considered that some of the contractual processes were harmful to allowing a basis for proper private competition in the procurement being undertaken by authorities to meet their requirements. The 1992 Act contained provisions requiring local authorities following request to give reasons for their decisions in contractual matters and to re-access and compile tender lists which had been affected by the consideration of non-commercial matters.

The provisions in the 1980, 1988 and 1992 Acts covering CCT were intended to provide a structured and clear procedural framework for the procurement of goods, services and works. The structured framework together with the supporting provisions were intended to control the amount of discretion in the procurement process that local authorities previously enjoyed

¹⁹⁴ D. Parker. *The 1988 Local Government Act and Compulsory Competitive Tendering* (Cranfield School of Management. 1990)

¹⁹⁵ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the UK and EU* (3rd edn, vol 1 Sweet & Maxwell 2014) 3

¹⁹⁶ Local Government, Planning and Land Act 1980 Part, III

¹⁹⁷ Local Government Act 1988 Part, I

¹⁹⁸ Local Government Act 1992 S8

in the making of decisions on delivery and undertaking public procurement. CCT was further intended to provide accountability in the procurement process especially financial accountability. This accountability covered the employment of a local authority's own labour force in that such a direct or in-house labour force which could only be used if such an organisation had won a Tender in competition. In undertaking work under CCT a local authority had a duty to comply with a set of regulations primarily designed to avoid anti-competition tendering behaviour.¹⁹⁹

The introduction of CCT to suppliers meant that the role of local authorities changed from being a direct service provider using only limited external support service providers to one of awarding contracts.²⁰⁰ When a local authority awarded a Contract to a Direct Labour/ Direct Service organisation within that local authority, there was always a problem in that the contractual relationship was not the same as between an authority and a supplier. This was due to the in-house organisation being legally part of the local authority and so the force of any contractual term could not be fully employed and operated. This situation also had an impact on transaction costs and the tender offer.

Further concerns had been raised in use of the documents and materials included in the procurement process especially in the Invitation to Tender documents. Provisions were then included in the CCT system to avoid the possibility of a local authority tailoring the descriptions of the functions covered by the procurement in such a way as to exclude other tenderers²⁰¹ as had occurred when a similar tendering system was operated in Denmark.

The process and requirements for competitive tendering was also imposed on parts of central government and areas of the National Health Service.²⁰²

Further legislation in the form of The Local Government Act 1999 imposed on local and certain other authorities' specific requirements in relation to economic issues and the efficiency and effectiveness of councils. The purpose of the Act was two-fold.²⁰³ The first

¹⁹⁹ Danny Frederick, *Why Compulsory Competitive Tendering for Local Government Services is not as good as Privatisation* (Economic Notes 54. 1994)

²⁰⁰ David Wilson, Chris Game, Steve Leach and Gerry Stoker, *The Impact of Competitive Tendering* (Macmillan Education UK 1994) 35

²⁰¹ Council of Europe, *The Role of Competitive Tendering in the effective provision of Local Services* (1994).

²⁰² Peter Gershon, *Review of Civil Procurement in Central Government* (H.M. Treasury, 1999) 12

²⁰³ Local Government Act 1999 Part I and the Explanatory Notes.

subjected most bodies within the finance system of local government in England and Wales to a new duty to set up a framework of arrangements for the achievement of best value²⁰⁴ in the performance of their functions but especially in relation to procurement. Secondly the Act provides for the abolition of Part III of the Local Government Planning and Land Act 1980 and Part I of the Local Government Act 1988 together with provisions of the Local Government Act 1992 which all relate to CCT. The Researcher found in practice that the imposition of CCT caused difficulties for purchasing staff operating the requirements and very little transparency was provided. The application of CCT with its change in the parameters of specifications and methods of evaluation together with the monitoring of contracts and imposition of penalties was a learning process for all involved.²⁰⁵

The procurement considerations for and the operation of CCT was formally published in January 2000 however CCT has left a lasting legacy on the conduct of public procurement by local authorities and also the broader implications for public procurement in general.²⁰⁶

In relation to local government having the functions to include the power to enter into contracts for assets and services, the Local Government (Contracts) Act 1997²⁰⁷ conferred such powers. This Act made it clear relating to the discharge of a local authority of any or all of its functions and duties including discharging these functions by arranging a Contractor to provide assets or services.²⁰⁸ The 1997 Act also certified a schedule of contracts to be *intra vires*, this being where a local authority has the power to enter into a contract and had exercised that proper purpose in entering into such a contract²⁰⁹.

It is a well-established principle that local authorities only have the powers given to them by statute and accordingly they must act within such powers. A local authority may act ‘*ultra vires*’ if they act in bad faith or exercise their powers for some unauthorised purpose. Local

²⁰⁴ Best value has been described as securing continuous improvement in the exercise of all functions undertaken by an authority, whether statutory or not, having regard to a combination of economy, efficiency and effectiveness.

²⁰⁵ Robin Milne, Graeme Roy and Louis Angeles, *Competition, Quality and Contract Compliance – Evidence from Compulsory Competitive Tendering in Local Government in Great Britain 1987-2000* (33(4), Fiscal Studies 2013) 12

²⁰⁶ Philip Gosling *The effects of Compulsory Competitive Tendering and European Law on Local Authorities* (Kluwer Law International 2001) 26

²⁰⁷ Local Government (Contracts) Act 1997 Section 1

²⁰⁸ *Hazell v Hammersmith and Fulham, London Borough Council* [1992] 2 AC1, [1991]

²⁰⁹ Local Government (Contracts) Act 1997 Subsection 1 subject to Section 5 (special provisions about judicial reviews and audit reviews).

authorities must act in a reasonable manner and where appropriate with fairness and any breach of the general duty may be challenged through the process of judicial review. This is brought under the principle of natural justice that any person affected by an administrative decision is entitled to a hearing before the decision is made. In public procurement terms in the case of *R v Enfield Borough Council*²¹⁰ the Court considered a decision by a local authority to suspend a Contractor from the local authority's lists of approved Contractors/Suppliers and found that this was subject to judicial review for breach of the rules of natural justice.

It can be taken from case law that local authorities do not have an entirely free hand in the structuring and managing of the procurement process for major contracts. It is further shown that if local authorities are to obtain a beneficial outcome from the public procurement process without serious risk of legal challenges, they must have an awareness of and act within their common law obligations in relation to those which are imposed by statutes. The Government has procedures in place which place tight constraints on local authorities in the conduct of the procurement process and further in the duty of care owed to tenderers. This is shown in the case of *Blackpool and Fylde Aero Club v Blackpool Borough Council*²¹¹ where the council invited tenders from a number of firms for a commission covering the operation of pleasure flights. One of the tenders submitted was excluded from consideration and evaluation on a mistaken basis the tender had been received late. The Court held that in fact the exclusion was a breach of an implied term that had come into existence when tenders were invited by the Council. When the Council invited tenders, all those organisations so invited had the right to have their offer taken into consideration when a tender had been properly submitted in accordance with the requirements of the Council. It was further considered by the Court that in conducting the procurement the Council had a duty to act in accordance with the reasonable commercial expectations of those firms that had been invited to tender. Under EU procurement law transposed into UK law the matter of submission of tenders and the evaluation and exclusion of tenders are now clearly defined and although an authority has procedures to follow, the action of the authority as in the Blackpool case must be reasonable and further there has to be transparency, equal treatment and non-discretionary factors to be taken into consideration.

²¹⁰ *R v Enfield Borough Council ex-parte TF Unwin* (1989) 46 B.L.R. 1

²¹¹ *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 W.L.R. 1195

The law in the UK was set to promote the general duty of ‘Best Value’ for all aspects of the activities of local government. Within this requirement procurement was included together with making decisions in the operation of the procurement process.²¹²

In October, 1999 a Report by the National Audit Office was published entitled *Modernising Procurement*.²¹³ The Report stated that the Treasury had encouraged departments to improve their procurement practices and also highlighted providing better training, six principles for achieving value for money, the implementation for electronic commerce and the scope for further expansion of Framework Agreements.

A separate Report in 1999 entitled *Review of Civil Procurement in Central Government*²¹⁴ referred to the high cost of delivery of public procurement. There was an acceptance of failures in the undertaking of public procurement, however with the intention of encouraging good practice and building on earlier research and papers, these failures would be reviewed, and proposals were made for the future.

The Cabinet Office in a review of public procurement published in 2003,²¹⁵ emphasised that leadership and capability are to be addressed and that the achievement of good results could be obtained through a focus on outcomes rather than rigid rules. Also, in 2003 to pursue the strategy for value for money in the public sector a number of initiatives were launched including the National Procurement Strategy for Local Government.²¹⁶

An independent review undertaken in 2004 by Sir Peter Gershon on Public Sector Efficiency for the UK Government was entitled *Releasing Resources to the Front Line*²¹⁷ and highlighted the fact that there was significant scope for better supply-side arrangements and further professionalism in the operation of the procurement function. A number of proposals were put forward in respect of public procurement.

²¹² Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the UK and EU* (3rd edn, vol 1 Sweet & Maxwell 2014) 3

²¹³ *Modernising Procurement* (National Audit Office 1998) 5

²¹⁴ *Review of Civil Procurement in Central Government* (H.M. Treasury, 1999)

²¹⁵ *Making a Difference : Reducing Bureaucracy in Central Government Procurement* (Cabinet Office, 2003)

²¹⁶ Local Government Association, *National Procurement Strategy for Local Government in England* (2003)

²¹⁷ Peter Gershon, *Releasing resources to the front line : Independent review of public sector efficiency* (HM Stationery Office, 2005) 13

Procurement in the UK was traditionally undertaken on a decentralised basis by individual government departments and agencies. Such bodies enjoyed a broad freedom to make their own purchases to meet specific requirements and a wide discretion in the establishment of their own procurement policies.²¹⁸ There was no coherent or consistent approach within policies and practices to undertake the procurement, often locally referred to as purchasing, and in practice this approach has not assisted in the operation or improvement of public procurement.

In the UK there have been relatively low levels of corruption in public services.²¹⁹ The award of a public procurement contract could however be an area where corruption may occur and care has to be taken for the avoidance of corruption when putting processes and contracts in place and during their execution. It would appear that there is little legislation specifically drafted to limit corruptive practices although the 1972 Act²²⁰ contained requirements directed at fighting corruption in local government. In relation to corruption, the Public Bodies Corrupt Practices Act 1889 was enacted following revelations and findings of malpractice in the Metropolitan Board of Works concerning public procurement. Two further Prevention of Corruption Acts were enacted in 1906²²¹ and 1916²²². The whole of these two Acts stood until they were either repealed or revoked by the Bribery Act, 2010.

2.3.2 The EC and the EU Procurement rules

To understand the controls and structure of European Procurement Regulation the European Community (EC) and then the European Union (EU) have to be considered. The EEC also referred to as the EC were described as a midway between confederalism which recognises the complete interdependence and federalism which seeks to bind them as a super state.²²³ The European Union (EU) has been said to have a supranational union²²⁴ with supranational

²¹⁸ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the UK and EU* (3rd edn, vol 1, Sweet & Maxwell 2014) 12

²¹⁹ Knight's Guide to Best Value and Competitive Tendering Law, (Issue 12 2000) B1-7

²²⁰ Local Government Act 1972.

²²¹ Prevention of Corruption Act 1906 which was extended to apply to all agents in the public or private sector.

²²² Prevention of Corruption Act 1916 includes wartime processes and extended to contracts with the War Office on a temporary basis.

²²³ P. Reuter, *La Communauté du Charbon et de l'Acier* (France, 1953) 7.

²²⁴ A supranational union is a type of multinational political union where negotiated power is delegated to an authority by governments of member states.

competence only to the extent that they are conferred by its Member States but the union exercises its powers in a sovereign manner with its own legislative, executive and judicial authority.²²⁵

2.3.3 The Treaty Framework

The primary legislation for European procurement regulation lies in the provisions of the European Community and then the European Union treaties. The rules in the treaties being prohibitive in nature were found to be insufficient in the protection of Member States in respect of procurement. For this reason, regulation through secondary legislation known as the procurement directives was required that harmonised the procurement laws of Member States.

The basic objectives of the EC were set out in Article 2 of the EC Treaty.²²⁶ The provisions in the original Treaty which are most relevant in respect of public procurement are Article 12 (new Article 34) - prohibition against discrimination on grounds of nationality, Article 28 (new Article 56) – the free movement of goods and restrictions on imports or exports, Article 43 (new Article 49) – freedom of establishment and Article 49 (new Article 56) – the freedom to provide services.

The Treaty principles most relevant in terms of procurement are (1) equal treatment, (2) transparency, (3) legal certainty, (4) proportionality and (5) the freedom to provide services. Of these principles it is that of transparency which has received the most attention.²²⁷ The principle of legal certainty has been used and interpreted to require that Community rules must be clear with their application foreseeable by all concerned.²²⁸ Proportionality has often been used as an element of whether an action which may otherwise discriminate can be

²²⁵ Kiljunen K. *The European Constitution in the Making* (Centre for European Policy Studies. 2004) 21-27

²²⁶ The Treaty of Rome 1957 (EECT Treaty) was amended by the Single European Act 1986, the Treaty of Maastricht 1992, officially known as the Treaty on European Union (TEU), The Treaty of Amsterdam 1997, the Treaty of Nice 2001 and the Lisbon Treaty 2009 renamed the Treaty on the functioning of the European Union (TFEU).

²²⁷ Case C-44/96 Mannesmann Anlagenbau AG and others v Strohal Rotationsdruck GmbH [1998].

²²⁸ M. Krugner, *The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions* (2003) and in the case C-324/98 Telaustria and Telefonadress v Telekom Austria [2000] ECR I-10745.

justified.²²⁹ The provision within the Treaty also forbids Member States from giving assistance to industry, this being defined as State Aid. In the event therefore that a contract is not a commercial transaction then the award of such a public contract may constitute unlawful state aid.

The Articles to the Treaty in themselves were considered as being inadequate to ensure the fundamental requirement of equal treatment of bidders from all Member States. It was therefore considered that unless transparency procedures were put in place and standards imposed upon a Community wide basis, discriminatory procurement practices and behaviour in the award of contracts would be unable to be cancelled. In addition, special provisions were required to ensure that there was a structure for the effective enforcement of the rules by aggrieved bidders.

To remedy this situation the EC (now the EU) adopted Procurement Directives which regulate award procedures for major projects including that the award of a public contract should be made on commercial criteria. A Directive is a form of legislation which requires each Member State to ensure that it has the appropriate laws within its own legal system so that the rules of the Directive or Directives are implemented.²³⁰

2.3.4 The Procurement Directives

Directives are one of the methods which allow the EC/EU valuable flexibility as they can be applied by each Member State into their own legal systems. The force of EC/EU Directives has been reviewed by rulings of the European Court of Justice.²³¹

The development of the procurement system and how it has evolved in the EC has to be considered from an historical viewpoint.²³² Community interaction in public procurement began by the operation of two General Programmes²³³ which demonstrated the concerns of

²²⁹ Case C-324/93 R v Secretary of State for the Home Department ex-parte Evans Medical Ltd. and Macfarlan Smith Ltd. [1995] ECR I-563.

²³⁰ Lee Diggins and John Bennett, *EC Public Procurement Law and Practice* (1(1) Sweet & Maxwell 2010) 1-19

²³¹ Paul Craig and Gráinne de Búrca, *EU Law (Text, Cases and Materials)*, (6th edn, OUP 2015) 108

²³² Friedl Weiss, *Public Procurement in European Community Law* (Athlone Press. 1993) 20

²³³ General Programme for the abolition of restrictions on freedom to provide services (OJ 2/32) and General Programme for the abolition of restrictions on freedom of establishment (OJ 2/36).

the Community in the field of procurement.²³⁴ The implementation of the General Programmes were made by a series of Directives which were of two types, the Liberalisation Directives which were used to eliminate restrictions and the Co-ordination Directives in the case of procurement to provide a structure for national award procedures.

There were three general Liberalisation Directives were formally adopted in 1964 as part of a plan for the implementation of the General Programmes.²³⁵ In the case of public procurement the Directives whilst not being specific Procurement Directives resulted in a prohibition on national measures and conditions on foreigners submitting offers to participate whether as a Contractor or a sub-contractor in public contracts awarded by the state or others governed by public law.²³⁶

The first Liberalisation Directive²³⁷ was adopted in 1971 although there were proposals from a Directive put forward in 1964 which resulted in the removal of restrictions in the areas of the freedom of establishment and the execution of works contracts.

The initial Directive 70/32²³⁸ was adopted under the Treaty which included the procedure for the adoption of Directives by the Commission.²³⁹ This Directive applied to public supply contracts especially those relating to the supply of products used in the construction industry whether or not they were an integral part of a public works contract. It has been said that as this Directive was adopted by the Commission before the end of a transitional period for Directives, its role is mainly of interpretive value.²⁴⁰

²³⁴ Peter Trepte, *Public Procurement in the EU. A Practitioner's Guide*. (OUP. 2007) 23

²³⁵ Council Directive 64/427 (OJ 1964 No. 117/1863), Council Directive 64/428 (OJ 1964 No. 117/1871) and Council Directive 64/429 (OJ 1964 No. 117/1880).

²³⁶ A body governed by public law is a body

- Established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and
- Having legal personality; and
- Financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

²³⁷ Council Directive 71/304 (OJ 1971 L185/1)

²³⁸ Council Directive 70/32 (OJ 1970 L13/1)

²³⁹ The Commission is the administrative arm of the European Union and its full title is the European Commission.

²⁴⁰ Peter Trepte, *Public Procurement in the EU. A Practitioner's Guide* (OUP 2007) 29

The second element of implementation of the General Programmes in the form of the Co-ordination Directives followed with the adoption of two Co-ordination Directives, these being Directive 71/305²⁴¹ on public works contracts and Directive 77/62.²⁴² The first Directive 71/305 set out the basis for the award by Member States of their public works contracts and further for the advertisement of such contracts throughout the Community to allow Contractors in the Community to have available to them adequate information so they could assess whether the Contracts were of interest to them to submit a Tender.

The purpose and intent of Directives 71/305 and 77/62 in relation to procurement was to ensure transparency and also so that procurement could be better supervised by Member States. Both of these Directives contained provisions for their application to apply only to proposed procurement contracts above a given stated financial threshold which was set at that time at 1 million units of account in the case of public works and 200,000 units of account in respect of supplies contracts. In Article 12 of Directive 71/305 there was a provision for contracts with a value of less than 500,000 units of account to be voluntary rather than the mandatory requirements for the stated threshold of 1 million units of account. The awarding of public works contracts was covered by Directive 71/305 which confirmed the principles of transparency and non-discrimination but did not however replace national tendering procedures and practices.

Within Directive 71/305 there was reference in Recital 8 to the Commission at a later date submitting a proposal for a Directive with the aim to lower the stated threshold for public works contracts to avoid a possible concern of the current threshold value which excluded a number of economically important works contracts²⁴³ and further excluded small and medium sized enterprises from tendering for such contracts.

The procedures for awarding public services contracts were co-ordinated in Directive 77/62 which introduced three basic principles, these being contracts had to be advertised community wide, any discriminatory technical specifications were prohibited, and tendering and award procedures must be based on objective criteria.

²⁴¹ Council Directive 71/305 (OJ 1971 L185/5)

²⁴² Council Directive 77/62 (OJ 1977 L13/1)

²⁴³ Friedl Weiss, *Public Procurement in European Community Law* (Athlone Press. 1993) 41

The conceptual foundation of current EU procurement law resulted from a White Paper in 1985 from the European Commission²⁴⁴ and the Single European Act of 1987.²⁴⁵ Upon this basis Directive 88/295²⁴⁶ which amended all previous public supplies Directives and introduced a number of procedures which are in current EU procurement law. Public works contracts were then covered by Directive 89/440²⁴⁷ which included provisions for Concessions Contracts and consortia participation. As EC Member States were required to ensure effective and swift judicial review of decisions reached by contracting authorities, the first Remedies Directive²⁴⁸ relating to works and services areas introduced. This Remedies Directive introduced an ‘attestation procedure’ so that contracting authorities could certify compliance of their procedures and practices to meet with procurement law.

To increase transparency a new provision was included to bring an improvement on the advertising rules for contracts. This provision covered a new requirement to publish a Prior Information Notice which was said would assist contracting authorities to plan their financial budgets in a year and to return the time scales for the procurement set out in the Directives. In addition, the threshold value for works was increased to €5m, this threshold being set to allow for the rise in the costs of construction projects and also to meet the interests of small and medium sized enterprises tendering for medium sized projects.²⁴⁹

In 1990 the first Public Utility Directive²⁵⁰ covering energy, telecommunications, transport and water sectors was issued, these areas up to that date having escaped European procurement law and regulation.

A number of reviews were undertaken by the Commission covering the implementation and operation of the early Directives by Member States. The findings revealed disappointing results in the achievement of the intended effect of such Directives and the Commission issued their findings in a number of papers.²⁵¹ The main elements of concern from the findings covered lack of commitment in developing competition, an under estimating by

²⁴⁴ European Commission White Paper for the Completion of the Internal Market (1985)

²⁴⁵ Single European Act [1987] OJ L169

²⁴⁶ Directive 88/295/EEC [1988] OJ L127/1

²⁴⁷ Directive 89/440/EEC [1989] OJ L210/L

²⁴⁸ Directive 89/665/EEC [1989] OJ L395/33 Remedies Directive

²⁴⁹ Article 21 of Directive 89/440 for public works contracts and Article 16 of Directive 88/295 for public supplies contracts.

²⁵⁰ Council Directive 90/531/EEC [1990] OJ L297/1

²⁵¹ Com (1984) 717, Com (1984) 747 and Com (1986) 375.

contracting authorities to bring down the values below the stated thresholds and the division of projects into lots, again to avoid the application of the Directives. The Commission further stated that there was a failure on the part of a number of Member States to actually implement the Directives into their national law and that enforcement mechanisms should be put in place to ensure that the Directives are implemented.

In the areas of works and supplies a consolidation of the text of a number of previous Directives was undertaken into Directives 93/36²⁵² and 93/37²⁵³ with specific term ‘transparency’ now replaced by reference to the provision of information under Recital 14 and 10 of the Directives respectively.

In 1992 the single market the Services Directive²⁵⁴ was introduced. The following year the previous Supplies, Works and Utilities Directive were readopted.²⁵⁵ These Directives continued to be in operation until 2004 when a fourth generation of Directives were issued. These Directives resulted from procurement legislation being consolidated following simplification and modernisation. The previous Services, Works and Supplies Directives were amalgamated into a Single Public Sector Directive.²⁵⁶

The reform of the Directives was again under review by the Commission and in 1998 by a further Communication on Public Procurement.²⁵⁷ Following this Communication two new Directives were proposed, one for the Public Sector and the second for the Utilities Sector. A full debate was held in the European Parliament and following subsequent amendments the proposals became Directives in 2004. The final adoption of the Directives was made against the background of developments on the Treaty which itself was reflected in the Directives.²⁵⁸

The 2004 Public Sector Directives and the earlier Directives had left a number of ambiguities, uncertainties and questions which are needed to be addressed and many of these

²⁵² Council Directive 93/36/EEC [1993] OJ L199/1

²⁵³ Council Directive 93/37/EEC [1993] OJ L199/54

²⁵⁴ Council Directive 92/50/EEC [1992] OJ L209/1

²⁵⁵ Council Directive 93/36/EEC [1993] for Public Supplies Contracts, Council Directive 93/37/EEC [1993] for Public Works Contracts and Council Directive 93/38/EEC [1993] for Utilities Contracts.

²⁵⁶ Directive 2004/18/EC of the European Parliament and the Council of the 31st March 2004 on the co-ordination of procedures for the award of public works, public supply and public services contracts.

²⁵⁷ Commission’s Communication on Public Procurement in the European Union Com (1998) 143.

²⁵⁸ Peter Trepte, *Public Procurement in the EU. A Practitioner’s Guide* (OUP. 2007) 38

in turn were subsequently considered for judicial interpretation. I cover an overview of the 2004 Public Sector Directive in Section 4 of this Chapter.

Since the two 2004 Directives, 2004/17/EC and 2004/18/EC, came into force a hundred or so Judgements made by the CJEU have fleshed out community law.²⁵⁹ Revision to the Public Sector Directive 2004 was therefore required to be undertaken and to consider the complexity of the public procurement regime.

The historical data leading up to the 2014/24/EU Directive is discussed within Chapter 3 to this thesis.

2.3.5 UK Implementation of European Procurement Directives

On the 1 January 1973 the UK joined the European Economic Community, also known as the Common Market. In 1972 the European Communities Act was passed; this piece of legislation brought the UK into the European Union and it gave the EU supremacy over UK national law. This Act gives legal authority for EC, now EU, law to be national law in the UK.

In relation to some types of legislation including directives and decisions, these can be made to apply in the UK either by way of primary legislation such as an Act of Parliament or by secondary legislation which is the most common route.

The implementation of both EC and EU Directives in the UK are enacted by Regulations under Section 2 of the European Community Act 1972. As shown earlier in this Chapter Member States were slow to implement European Directives and so it was not until the issue of the Works Directive 89/440²⁶⁰ that any formal action in the UK was taken. Member States have a period of two years to implement Directives into national legislation. As a result, The Public Contracts Regulations 1991²⁶¹ came into force in December 1991. These Regulations were subsequently amended to implement the rules relating to public works contracts which

²⁵⁹ Eric Van den Abeele, *The reform of the EU's public procurement directives : a missed opportunity?* (Working paper 2012.11 ETU1 aisbi Brussels) 14

²⁶⁰ Council Directive 89/440/EEC [1989] OJ L127/1

²⁶¹ Statutory Instrument 1991 No. 2680

were contained in Directive 93/37/EEC together with the rules on remedies in Directive 89/665/EEC in so far as they relate to public supply contracts.

Directive 93/36/EEC covering the rules on public supply contracts was implemented into UK law in the Public Contracts Regulations 1995.²⁶² Rules on remedies which affect supply contracts in Directive 89/665 were also implemented. The rules on public services contracts contained in Directive 92/50/EEC and the rules on remedies which affect public services contracts in Directive 89/665 were also implemented in The Public Services Contracts Regulations 1993²⁶³ for public supply contracts.

The three Directives which separately related to public works, supplies and services contracts were amended by Directive 97/52/EC which was implemented in the UK by The Public Contracts (Works, Services and Supply) (Amendment) Regulations 2000²⁶⁴ also covered new financial thresholds to bring the EU in line with the Government Procurement Agreement.²⁶⁵

The implementation of the amended Public Contracts Regulations brought a structure to the rules on public procurement in the UK and covered specific threshold limits, procedures for the procurement and the award of a contract, selection of Contractors or Suppliers, technical specifications and applications to the court.

The EU procurement rules apply to bodies governed by public law.²⁶⁶ Registered Social Landlords²⁶⁷ governed by The Housing Act 1996 did not accept that the EU procurement rules applied to them. In Case C-237/99 *Commission v France*²⁶⁸ which related to entities who provide social housing in France it was found that such entities were governed by public law. Registered Social Landlords in the UK still did not accept they were governed by the EU rules, however in December 2003 the European Commission gave notice to bring infraction proceedings against the UK following which the Government accepted that such

²⁶² Statutory Instrument 1995 No. 201

²⁶³ Statutory Instrument 1993 No. 3228

²⁶⁴ Statutory Instrument 2000 No. 2009

²⁶⁵ The Agreement on Government Procurement is a plurilateral agreement under the auspices of the World Trade Organisation (WTO)

²⁶⁶ Paragraph 9 of Article 1 of the Consolidated Directive 2004/18/EC

²⁶⁷ This classification includes Housing Associations.

²⁶⁸ Case C237-99 *Commission v France* [2001] E.C.R.I-00939.

Registered Social Landlords were covered by the rules. In practice there is still some resistance on the part of such entities in fully following the procurement rules.

A further example of whether the Directive and the domestic public contracts regulations were applicable related to national universities. In 2001 this was initially adjudicated in the UK Court in *R v HM Treasury Exp the University of Cambridge*.²⁶⁹ A challenge was made by the University of Cambridge to the UK Government's decision and the principles of interpretation of the provisions in the Directive were laid down by the Court of Justice in Case C-380/98, *R v HM Treasury Exp the University of Cambridge*.²⁷⁰

Following a long period of review the new Directive 2004/18/EC was transposed for England, Wales and Northern Ireland by The Public Contracts Regulations 2006.²⁷¹ The instrument applies to England, Wales and Northern Ireland as in Scotland they implemented the Directive independently. The Public Contracts Regulations 2006 came into force on 31 January 2006. As the Directive had been adopted at European level there was no option but to implement the Directive into UK law by the deadline of the 31 January 2006.

The Public Contracts Regulations in England and Wales includes remedies and enforcement contained within Directive 89/665 which are the minimum standards for procurement. The provisions of the Remedies Directive were amended by Directive 2007/66²⁷² which was in turn transposed into law in England and Wales by The Public Contracts (Amendment) Regulations 2009²⁷³ which came into force on the 1 December 2009. These reforms when implemented significantly strengthened the remedies for a breach of the procurement rules and in turn made it easier for suppliers to mount legal challenges.

In the 2010 Case C-406/18 *Uniplex (UK) Ltd. v NHS Business Services Authority*²⁷⁴ the Court of Justice of the European Union (CJEU) concluded that a rule in the UK Public Contracts Regulations in relation to the time for Suppliers to challenge contract proceedings was imprecise, uncertain and not compatible with EU law. As a result of this decision and

²⁶⁹ *R v HM Treasury Exp the University of Cambridge* [2001] EWHC Admin 978

²⁷⁰ Case C-380/98 *R (on the application of University of Cambridge) v HM Treasury*; sub nom. *R v HM Treasury Exp the University of Cambridge* [2000] 1 W.L.R. 2514

²⁷¹ Statutory Instrument 2006 No. 5.

²⁷² Council Directive 7/66/EC [2007] OJ L335/31

²⁷³ Statutory Instrument 2009 No. 2992.

²⁷⁴ Case C-406/18 *Uniplex (UK) Ltd. v NHS Business Services Authority* [2010] PTSR

following consultation changes to the rules together with the updating of a range of the existing procurement rules come into force in England and Wales in *The Public Procurement (Miscellaneous Amendments) Regulations*, 2011.²⁷⁵

On the 26 February 2014 the Public Sector Directive 2014/24/EU on public procurement which repealed Directive 2004/18/EC was passed. This Directive came into force on the 17 April 2014. The Cabinet Office on behalf of the UK Government provided policy guidance notes²⁷⁶ in February 2015 which also stated the Government intended to implement the Directive as soon as possible. The Directive was transposed into UK law in February 2015 and became The Public Procurement Regulations 2015.²⁷⁷

Directive 2014/24/EC which has been said to have been modernised, made simpler and more flexible in operation together with The Public Contracts Regulations 2015 are further considered in Chapter 3.

2.4 Section 4 : Overview of Directive 2004/18/EC and the Public Contracts Regulations 2006 (both of which have been repealed)

2.4.1 General Introduction

This Section sets out an overview of the Consolidated Directive 2004/18/EC²⁷⁸ also referred to as Directive 2004 and the Public Contracts Regulations 2006 (PCR 2006)²⁷⁹ which transposed the Public Sector Directive for England, Wales and Northern Ireland.

Although the main area of the research relates to the modernisation of the rules in the 2014 Directive,²⁸⁰ the review of the Directive 2004 has been undertaken because there were some

²⁷⁵ Statutory Instrument 2011 No. 2053.

²⁷⁶ Crown Commercial Services of the Cabinet Office : Policy Procurement Note 02/15 Public Contracts Regulations 2015.

²⁷⁷ Statutory Instrument 2015 No. 102.

²⁷⁸ Directive 2004/18/EC of the European Parliament and Council of March 31, 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts [2004] O.J. L134/114.

²⁷⁹ Statutory Instrument 2006 No. 5 – Public Procurement, England and Wales, Public Procurement, Northern Ireland

²⁸⁰ Directive 2014/24/EU of the European Parliament and of the Council of the 26 February 2014 on public procurement and replacing Directive 2004/18/EC

similar intentions for the Directive 2004 to those in the later Directive. Directive 2004 was brought in to meet the intentions of simplifying and clarifying this Directive to make the Directive easier to use in practice as the previous rules had been found to be complex.²⁸¹ Recital (1) of the 2004 Directive states that amendments have been made to meet the requests for simplification and modernisation made by contracting authorities and economic operators alike.

2.4.2 Changes and reforms to the 2004 Public Sector Directive

2.4.2.1 Changes, simplification and clarifications

Until the Public Sector Directive in 2004 (Directive 2004), the main Co-ordination Directives were Directive 93/36²⁸² on public supply contracts, Directive 93/37²⁸³ on Public Works Contracts and Directive 92/50²⁸⁴ on Public Services Contracts.

With the exception of one area relating to Article 41 of the Services Directive 92/50 which was a provision amending the Remedies Directive 89/665²⁸⁵, the Public Sector Directive formally repealed and replaced the Directives 92/50, 93/36 and 93/37 on public services, supplies and works respectively. The repeal of the provisions in the three Directives was without prejudice to the obligations of Member States to implement these three Directives.²⁸⁶

In relation to simplification and clarification, although the previous Directives on works, supplies and services were now consolidated with the effect of either the removal or reduction in the differences which existed between the previous Directives, a number of unjustified areas of differences were retained²⁸⁷. Some differences between the treatment of works, supplies and service contracts were either removed or reduced as part of the clarification process.

²⁸¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the UK and EU* (3rd edn, vol 1 Sweet & Maxwell 2014) 190

²⁸² Directive 93/36/EEC [1993] O.J. L199/1.

²⁸³ Directive 93/37/EEC [1993] O.J. L199/54.

²⁸⁴ Directive 92/50/EEC [1992] O.J. L209/1.

²⁸⁵ Directive 89/665/EEC Remedies Directive [1989] O.J. L395/33.

²⁸⁶ Article 82 of the Directive 2004/18/EC.

²⁸⁷ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*. (3rd edn, Sweet & Maxwell 2014) 191

An important change to simplify Directive 2004 was in the form of reducing the number of different financial thresholds. In the previous Directives the threshold values varied depending on the type of Contract in question or whether the entity concerned was covered by the Government Procurement Agreement²⁸⁸. The threshold values contained within Directive 2004 were established solely in Euros and the number of thresholds were reduced. Provision was made for the periodic review of the threshold values in line with any variation in the value of the Euro. The values of thresholds in the currencies of the Member States which do not belong to the monetary union were to be reviewed every two years from the base date of the 1 January, 2004, the revised values to be published in the November preceding any revision to come into effect in the January. The financial threshold values which were to be net of Value Added Tax were set for Works, Supplies and Services.

Reference is made within the Directive 2004 to the EU's special nomenclature for public procurement Common Procurement Vocabulary (CPV) to describe the contracts which are either covered by or excluded by the various provisions. The CPV means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No. 2195/2002 of 5 November, 2002 of the European Parliament and of the Council on Common Procurement Vocabulary. The nomenclatures used in previous Directives, these being the NACE or CPC, were still included.

The CPV establishes a single classification system for public procurement which is aimed at standardisation references used by contracting authorities and entities to describe procurement contracts.

By way of clarification Article 1 of Directive 2004 states the Directive is based on Court of Justice case law, in particular to the award criteria which clarifies the possibilities for contracting authorities to meet the needs of the public concerned. This included in the areas of environmental and social requirements provided that such criteria are linked to the subject matter of the Contract and do not confer an unrestricted freedom of choice on the contracting authority.

²⁸⁸ Peter Trepte, *Public Procurement in the EU. A Practitioner's Guide* (OUP 2007) 257

Within Article 2 of Directive 2004 there is confirmation of the express inclusion of a number of general principles, these being the award of contracts concluded in Member States on behalf of all contracting authorities including bodies governed by a public law entity are subject to rules governed by the Treaty and the principles of equal treatment, non-discrimination, mutual recognition and transparency. Reference is also made to the opening up of public procurement to competition. The general principles of equal treatment, non-discrimination and transparency are those which the Court of Justice has held to underlie the Directives.

Directive 2004 also included some further clarifications in respect of the re-ordering of provisions to present the order of the steps within an Award Procedure and to include CJEU²⁸⁹ interpretations relating to the requirement for the award criteria to be linked to the subject matter of a Contract.

The definition of ‘Contracting Authority’ has remained consistent throughout a number of earlier Directives²⁹⁰ however in Article 1(9) of Directive 2004 the definition has been confirmed and there are now three groups of entities which are the traditional State authorities with regional and local authorities, those bodies governed by public law and those associations formed by one or more of the bodies covered in the other two definitions.

2.4.2.2 Changes for increased flexibility

A number of provisions were introduced with the intention of increasing the flexibility of Directive 2004, these included a new award procedure in the form of Competitive Dialogue which was expected to provide a more flexible procedure for the award of complex projects.

Explicit provisions were included to authorise and regulate Framework Agreements²⁹¹ to provide legal certainty and controls in use including regulations to ensure transparency and competition and the adoption of a number of rules in relation to aggregation and award notices

²⁸⁹ CJEU – The Court of Justice of the European Union.

²⁹⁰ Peter Trepte, *Public Procurement in the EU, A Practitioner's Guide* (OUP 2007) 341

²⁹¹ Article 1(5) Directive 2004/18/EC

A new provision was included in respect of electronic procurement, one important area being the use of electronic communications. This was considered a main driver of reform which could ensure that electronic communication can be operated for most communications although there should be a control of use to prevent any barrier for access. It was stated that electronic communication could be used to reduce the minimum time limits in award procedures. A new provision was included for undertaking repeat procurements of standard purchases, this being ‘the dynamic purchasing system’²⁹².

New provisions were introduced in relation to central purchasing bodies²⁹³ with a central purchasing body being defined and there is provision that contracting entities may not misuse Framework Agreements in order to hinder, limit or distort competition.

In relation to social and environmental objectives which would allow Member States some flexibility in using public procurement to support such issues, these were not included, however a provision for the possibility of the reservation of contracts for sheltered workshops or sheltered employment programmes for handicapped persons were included.

Public authorities in Directive 2004 were now defined as the State, regional or local authorities, bodies governed by public law, association formed by one or several such authorities or one or several such bodies governed by law. The definition in Directive 2004 now confirms all state entities are now covered. In relation to ‘bodies governed by public law’, these are now defined in Article 1(9) of Directive 2004 and further clarified within Annex III of Directive 2004 although the origin of the use of Annexes comes from earlier Directives. It has been stated by the Courts that the fact that a body is not listed in Annex III does not mean that it is not a body governed by public law and although the list in an Annex to a Directive is based on the intention to be as complete as possible, the list is in fact no way exhaustive.²⁹⁴

Directive 2004 introduced some further amendments including a new requirement for public bodies to exclude from public contracts those organisations which had been convicted of

²⁹² Articles 1(6 and 33) of Directive 2004/18/EC

²⁹³ Recital 15 Directive 2004/18/EC

²⁹⁴ Case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [1998] ECR I-6821 and case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* [2003] ECR I-1931.

certain criminal offences connected with money laundering, organised crime, fraud on the EU and corruption in public contracts.²⁹⁵ Article 45(2) included discretionary grounds for exclusion relating to exclusion relating to professional honesty, insolvency and reliability with functions in Article 45(2) together with Article 45(3) to regulate the evidence used for exclusion on discretionary grounds.

In relation to the provisions said to have the intention of simplifying Directive 2004, some commentators considered that the rules remained unnecessarily complex and detailed and for the most part are even more complex and convoluted than previous Directives and included unnecessary detail and created important new ambiguities.²⁹⁶

The rules for technical specification including those using European Standards were amended.²⁹⁷ Additional transparency requirements were added as priorities of award criteria and a disclosure of the award criteria and sub-criteria and together with weightings and methodology for the award.²⁹⁸ Award criteria has to be disclosed in advance.

The disclosure and adaption of rules on the number of those involved in the restricted and negotiated procedures²⁹⁹ was also confirmed. Additional specific time limits were added requiring entities to take into consideration the complexity of the contract and further the time needed for the tender period for tendering such complex contracts.

One commentator has said that some of the amendments in fact applied more onerous obligations than earlier Directives.³⁰⁰

²⁹⁵ Article 45(2) of Directive 2004/18/EC

²⁹⁶ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*. (3rd edn, Sweet & Maxwell 2014) 191

²⁹⁷ Article 28 of Directive 2004/18/EC

²⁹⁸ Article 53(2) of Directive 2004/18/EC

²⁹⁹ Article 44(3) of Directive 2004/18/EC

³⁰⁰ Sue Arrowsmith, *The Law of Public Procurement : Regulation in the EU and UK* (3rd edn, vol 1 Sweet & Maxwell 2014) 193

2.4.2.3 Rules on abnormally low tenders

In Article 55 of Directive 2004, an explicit rule is included in respect of abnormally low tenders, however the concept of an abnormally low tender is not defined.³⁰¹ Article 55(1) sets out some provisions but it is unclear that the application is to ensure that contracting authorities are allowed to reject tenders that present a risk to the performance of a contract. Contracting authorities are not however allowed to reject a tender without good reason for the tender being low.

2.4.3 Overview of the Public Contracts Regulations 2006

Directive 2004 was implemented for England, Wales and Northern Ireland through the Public Contracts Regulations 2006 (PCR 2006). These Regulations also include rules within Regulation 47 on remedies for enforcing EU law in respect of those public sector contracts given by Directive 2004 pursuant to the Remedies Directive.³⁰²

The PCR 2006 came into force on the 31 January 2006 which was the final date for the implementation of Directive 2004. The PCR 2006 implemented Directive 2004 in detail and the regulations in the main follow the text of Directive 2004, this being to avoid either legal misinterpretation or errors in interpretation or unnecessary elaboration including any which could risk being at odds within Directive 2004.³⁰³

The complex and sometimes ambiguous nature of a number of the provisions in Directive 2004 did however arise in the PCR 2006. There were also some provisions in the PCR 2006 which were in fact more extensive than those in Directive 2004. The PCR 2006 has attempted to represent the text of Directive 2004 in a more friendly user way, examples of this being in the rules on criteria for selection and the conditions for reducing the time limits being stated.

³⁰¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*. (3rd edn, Sweet & Maxwell 2014) 802

³⁰² Remedies Directive 89/655/EEC (OJ 1989 L 395/33) as amended by the Services Directive 92/50/EEC (OJ 1992 L 209/1)

³⁰³ Cabinet Office, Explanatory Memorandum to the Public Contracts Regulations (p2, 2005)

In relation to the implementation of the PCR 2006 in England, Wales and Northern Ireland, the UK government provided for procuring entities to benefit from the maximum discretion permitted, an example being that no restriction was placed on award or selection criteria that may be operated other than those imposed by Directive 2004 itself.

The procurement policy on the operation of the PCR 2006 was subject only to limited guidance although a number of Regulation Impact Assessments were undertaken. In practice this led on a number of occasions to misunderstanding in the execution and delivery of the public procurement process.

As part of the initial information and guidance provided in relation to the PCR 2006, the now defunct Office of Government and Commerce (OGC), a division of the Cabinet Office, published in 2005 an Explanatory Memorandum to the PCR 2006. Within the background section of the Memorandum it is confirmed that the PCR 2006 provided a simpler and consistent text for the public sector which was intended to reduce the burdens involved in public sector procurement and improve efficiency as the scope of the EU rules now makes provision for modern procurement methods and systems such as e-auctions, framework agreements and the procedure for competitive dialogue. Reference was also made for enacting the provisions of the existing Remedies Directives with one change based on a clarification of the CJEU in relation to Article 2(1)(a) and Article 2(6) of the Remedies Directive. This related to the introduction of a mandatory standstill period between the notification of the award decision and entering into the Contract. This requirement ensures transparency and fairness on the part of a Contracting Authority to also provide details of the contract award decision to unsuccessful Tenderers. The Court held in Case C-81/89 *Alcal Austria AG v Bundesministerium für Wissenschaft und Verkehr*³⁰⁴ that members must in all cases be able to review and set aside award decisions on public procurement contracts subject to the EU procurement Directives. A subsequent CJEU ruling *Commission v Austria*³⁰⁵ clarified the period there should be between the notification of the contract award decision and the start of the contract to ensure that complainants are able in justified cases to bring action in their national courts for suspension and set aside of the contract award decision.

³⁰⁴ Case C-81/98 *Alcal Austria AG v Bundesministerium für Wissenschaft und Verkehr* [1999] E.C.R. I-07671

³⁰⁵ Case C-212/02 *Commission v Austria* [2004] (Judgement of 24 June 2004)

In March 2008 the now defunct OGC published some EU procurement guidance in the form of an Introduction to the EU procurement.³⁰⁶ The guidance sets out the new provisions which incorporated changes to procedures and requirements not included in previous rules. The main changes listed covered all those provisions in the Directive 2004 together with a 10 day ‘standstill period’ and advised all contracting authorities to consider all the issues now covered in the PCR 2006. Reference was made by the OGC to detailed guidance to be specifically provided in the areas of Framework Agreements, Mandatory Exclusion of Economic Operators and Competitive Dialogue procedures.

Further guidance on the EU procurement rules in relation to the PCR 2006 was introduced and covered specific reference to Contracts outside the scope of Directive 2004 where a tender process is not subject to the rules because the estimated value of a contract falls below the relevant threshold. The guidance also covered how to treat the differences of supplies, services and works contracts and the matter of Mixed Contracts. Reference was made to aggregation rules and thresholds, OJEU advertising requirements and time scales including a Prior Information notice and the Commissions website SIMAP. The OGC also provided the guidance on the choice and operation of the procurement procedure covering the four award procedures and stages in the procurement process. A note was provided on post tender negotiations which were not stated anywhere in Directive 2004 or the PCR 2006 but referred to the principles of transparency, the prevention of discriminatory behaviour and equal treatment. There was reference to the European Commission which had issued a statement on post negotiations in which it specifically ruled out any negotiation on price but in Open and Restricted Procedures. However, discussions with Contractors or Tenderers may be held only for the purpose of clarifying or supplementing the content of their Tenders or the requirements of the contracting authority and always providing that this does not involve or distort competition.

The guidance did not cover the approach in the PCR 2006 in defining entities covered by the rules. The approach in Directive 2004 seeks to identify more precisely those entities which are covered by the PCR 2006.³⁰⁷ Contracting authorities are defined in the PCR 2006 within Regulation 3(1) and are also covered in the Definitions section of Regulation 2(1). There are

³⁰⁶ Office of Government Commerce (OGC), Introduction to the EU procurement rules, March 2008.

³⁰⁷ Sue Arrowsmith, *The Law of Public Procurement : Regulation in the EU and UK* (3rd edn, vol 1 Sweet & Maxwell 2014) 431

three main categories which correspond with those in Directive 2004, however there are certain public bodies which are specifically listed by name or type of authority, other authorities falling within the general definitions in Regulation 3(1)(w) and joint catch-all bodies covered by public law. In Schedule 1 to the PCR 2006 which is headed GPA Annex 1 and in Regulation 3(1)(y) there are central government entities covered by the WTO's Government Procurement Agreement.

Regulation 19 of PCR 2006 had a slightly different definition of a Framework Agreement but in general contains the main elements of the definition in Directive 2004. It was not until 2008 that Guidance on Framework Agreements in the procurement was published by the UK Government.³⁰⁸

Regulations 30(6) to (9) of the PCR 2006 cover Abnormally Low Tenders. Again, as with Directive 2004 the concept of an abnormally low tender is not defined. Regulation 30(6) of PCR 2006 states that if an offer for a public contract is abnormally low, the contracting authority may reject that offer only if they have requested in writing an explanation of the offer or those parts which are considered to be abnormally low.

It was the intention of the PCR 2006 transposed from Directive 2004 to simplify and increase flexibility of the public procurement rules with a view to reduce the burden involved in the delivery of the procurement process. There was a further intention to improve efficiency in public procurement and ultimately to help deliver value for money for the taxpayer. In practice with the exception of the explicit provisions for Framework Agreements and the stages of the procurement award procedure where they are more clearly defined, the rules have not increased flexibility in use. The rules have also not been simplified and were still not understood by contracting authorities. Further changes and reforms were necessary, and the action taken in this regard I set out in Chapter 3.

³⁰⁸ Office of Government Commerce. OGC Guidance in Framework Agreements in the Procurement Regulations, September 2008

Chapter 3 Analysis of the Public Procurement Directive 2014/24/EU and the Public Contracts Regulations 2015

3.1 Section 1 : Introduction

In Chapter 1 it was explained that the research focuses on whether the current procurement rules contained in Directive 2014/24/EU which have been modernised and simplified have improved the public procurement process.

The current procurement rules considered are those contained within the Public Procurement Directive 2014/24/EU³⁰⁹ which were transposed into the Public Contracts Regulations (PCR) 2015³¹⁰ for England, Wales and Northern Ireland.

This chapter discusses and reviews the provisions in Directive 2014/24/EU and their implementation in the PCR 2015 with its aims to simplify and make more flexible the public procurement process in practice.

This chapter is organised as follows - Section 3.2 explores the four topic areas selected for the empirical research covered in Chapters 4 and 5. Section 3.3 provides a background to Directive 2014/24/EU (the Directive). Section 3.4 contains the changes, modifications and reforms introduced by the Directive. In Section 3.5 the focus turns to literature on the simplification and flexibilisation of the rules in the Directive. The final Section 3.6 covers provisions and specific reforms under Public Contracts Regulations 2015 (PCR 2015).

3.2 Section 2 : The four topics selected from the changes, modifications and reforms to Directive 2014/24/EU for the empirical research included in Chapters 4 and 5 of the thesis

3.2.1 General Introduction

In Section 2.2 of Chapter 2 I listed those areas which I had found in practice were either failures on the part of contracting authorities or were problems resulting from

³⁰⁹ Directive 2014/24/EU of the European Parliament and of the Council of the 26 February 2014 on public procurement and replacing Directive 2004/18/EC

³¹⁰ Statutory Instrument 2015 No. 102 – Public Procurement

misunderstanding the rules and application of the procurement process. The schedule in section 2 of Chapter 2 contains areas I have experienced over several years under the operation of the 2004 Public Sector Directive transposed into the PCR 2006, both documents now defunct, and then Directive 2014/24/EU transposed into the 2015 PCR.

I reviewed and analysed in detail the various items in Section 2 of Chapter 2 and then selected four topics based on my own experience in practice which I have found still causes difficulties on the part of contracting authorities in operation often through misunderstanding of the rules. The topic themes selected were Selection Criteria, Contract Award Criteria, Framework Agreements and abnormally low tenders. Although the themes were selected based on my own professional experience, there may be other areas which could give rise to issues and difficulties. From my professional experience the four topics selected provide an important and reasonable flavour of the kinds of challenges that the new rules give rise to.

In relation to the four topic themes I then reviewed the changes and modifications and reforms to these four areas within Directive 2014/24/EU and the PCR 2015 which I set out in sections 3.4 and 3.5 of this Chapter.

3.2.2 Specific consideration of the four selected topics

(1) Selection Criteria

This topic was selected as the criteria for qualitative selection provides a basis for the reduction of the number of economic operators who will be invited to tender. Alternatively, where the Open Procedure is to be operated Selection Criteria provides a structure for the eligibility for tender evaluation leading to award of a Contract at a later stage. In this regard the selection (or eligibility) criteria are an essential part of a competitive procurement procedure as this allows for basic consideration concerning the suitability of an economic operator to be assessed separately from the review of its economic (pricing/commercial) and technical offer.³¹¹

To improve the procurement process there has been a consolidation and clarification of the requirements in Article 58(1) of Directive 2014/24/EU, however all requirements are to be

³¹¹ Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015) 98

related to and be proportionate to the subject matter of the Contract being procured. The consolidation appears to clarify the requirement in Articles 41(1) and 42(2) of the now repealed Directive 2004/18/EC.³¹² It is clear that selection criteria can exclusively relate to (i) the suitability to pursue the professional activity concerned, (ii) economic and financial standing and (iii) the technical and professional ability of the economic operator, and in any case the requirements are to be limited to those that are appropriate and proportionate to the subject matter of the contract and are to be kept to a minimum in order to take into account the need to ensure genuine competition in the procurement. Reforms to the selection criteria now allow experience to be evaluated at the selection stage.

There have been specific changes and obligations in Directive 2014/24/EU covering selection, transparency of information and the selection of suppliers to be invited to tender. As the drafting of these provisions often give rise to uncertainty and misunderstanding on the part of practitioners, this further supports my view of the importance of selection criteria as a topic.

With specific reference to PCR 2015 there are new obligations in Regulation 58 which cover transparency of information, qualification and reduction of numbers together with the process of selecting suppliers. These new obligations also include the requirement in Regulation 110 to publish contract opportunities on Contracts Finder³¹³ in addition to those advertised by a Contract Notice in the EU *Official Journal*. The new obligations have been found in practice have not always been strictly followed with areas of misunderstanding by practitioners which I investigate in my research.

Within the PCR 2015 other changes have been made to the rules on the process of selection. The subsequent requirement for the use of a CCS Selection Questionnaire which also covers all the mandatory and discretionary exclusion grounds and other requirements in relation to selection criteria. This use of the Selection Questionnaire and other related elements covering Selection Criteria has not always been fully understood by contracting authorities and again I investigate this further in my research.

³¹² Directive 2004/18/EC Public Sector Directive [2004] O.J.L 134/1.

³¹³ Contracts Finder is a web-based portal provided for the purposes of Part 4 of Public Contracts Regulations 2015 by or on behalf of the Cabinet Office.

(2) Contract Award Criteria

Contract award criteria was selected as in practice the correct selection and application of the published award criteria will determine with whom the contracting authority will contract for goods, services or works. Contract award criteria must therefore merit an extensive commitment of time and review by well trained and experienced procurement personnel with advice from specialists in public procurement at the design stage of the procurement process. The question of how award criteria is devised by the contracting authority together with methods of weighting and scoring and then the evaluation of the Contract Award Criteria is fundamental to the procurement to be undertaken. Award Criteria are therefore one of the areas mostly commonly scrutinised when Tenderers review the procurement documents at Tender Stage and then following receipt by Tenderers after they have received notice of the decision to award a contract or conclude a Framework Agreement to consider a challenge that may be brought by a disgruntled Tenderer. The selection of Award Criteria is an area I have found in practice which is not either understood or given enough consideration when the procurement is being prepared, especially when linking the Award Criteria to the subject matter of the procurement.

Award criteria has always been a central factor in public procurement and this point is confirmed in Recital 89 to Directive 2014/24/EU³¹⁴ which states that the notion of award criteria is central to Directive 2014/24/EU. It is further stated that it is important that the relevant provisions relating to Award Criteria be presented in a simple and streamlined manner as possible.

The setting and operation of contract award criteria by contracting authorities I have found to be open to question which is also confirmed from my experience in undertaking a number of audits of procurement processes. Award Criteria evaluations and the award of contracts have been seen as areas which should be included in the execution of auditing public procurement.³¹⁵ Within Article 68 to Directive 2014/24/EU and Regulation 68 of the PCR 2015, the basis of the award of public contracts must be on the most economically advantageous tender assessed from the point of the contracting authority. The basis of the

³¹⁴ Directive 2014/24/EU of the European Parliament and Council of the 25 February 2014 on public procurement and repealing Directive 2004.

³¹⁵ SIGMA, Audit of Procurement, Brief 28 June 2013, European Commission and OECD 8 & 9.

award of public contracts I have not always found to be followed and so the contract award criteria is therefore considered to be an important area of my research.

Cost is now more prominent as a factor which can also be identified by a contracting authority as a basis within the most economically advantageous tender cost-effective assessment. Cost in Article 96 of Directive 2014/24/EU links cost to life cycle costing and there is a definition of Life Cycle in Recital 92 to Directive 2014/24/EU and in Regulation 2(1) of the PCR 2015. There is now specific reference to Life Cycle Costing, these being covered in Article 68 of Directive 2014/24/EU and Regulation 68 of PCR 2015. In the guidance on Awarding Contracts under the PCR 2015³¹⁶ issued by the Crown Commercial Services in the UK, Cost is stated as the acquisition price plus other economic costs and provides an example which is in fact similar to a life cycle definition. This change as part of the Award Criteria and evaluation must be considered by practitioners with its impact on the most economically advantageous tender (MEAT) process. In practice I have found that Life Cycle Costing is not understood and is also not considered to be appropriate even if the process of life cycle costing can be applied.

In Regulation 67(1) of the PCR 2015 the basis of the award of a public contract on the most economically advantageous tender is to be assessed from the point of view of the contracting authority, however Regulation 67(3) of the PCR 2015 which is based on Article 67(2) of Directive 2014/24/EU retains the previous requirement that award criteria must be linked to the subject matter of the public procurement.

Award criteria is now to be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in –

- (a) the specific process of production, provision or trading of those works, supplies or services, or
- (b) a specific process for another stage of their life cycle,

³¹⁶ Crown Commercial Service, The PCR 2015 and The Utilities Contracts Regulations 2016 – Guidance on Awarding Contract: An Overview, Key Points and Frequently Asked Questions (2016) 8

even where those factors do not form part of their material substance. Life cycle costing is considered as part of my research on contract award criteria.

The assessment of price/cost by contracting authorities must be clearly defined / specified by contracting authorities. This can range from a straightforward methodology dependent on the works, services or supplies being procured, to more complex projects or projects which permit variations. In any event the contracting authority must clearly disclose in advance which of the costs will be included in the evaluation and further its methodology for arriving at the final score on price/cost must be clearly defined to all Tenderers to ensure equal treatment. In practice I have found that the assessment of price/cost is not clearly defined by contracting authorities.

Under the rules there is now provision for contracting authorities to use Life Cycle Costing in their procurement undertakings to determine the best value. By Life Cycle Costing it is meant that there is now an incorporation into costs within an award model that has not previously been brought into the assessment except in complex and specialist procurements where Life Cycle Costing has been a specific requirement. Within the provisions there is now the internalising of costs that are usually externalised by not being taken into consideration and as it stands the rules on Life Cycle Costing are going to be extremely difficult to use properly in practice, however a relatively feasible part which can be promoted after full analysis and review by the contracting authority are costs which are actually borne by the contracting authority or a third party and are limited to the costs comprised by Regulation 68(1)(a) of the PCR 2015. The difficult and excessively complicated areas concern costs imputed into environmental externalities linked to the procurement, given they refer to costs not actually directly borne by any specific economic agent. In Regulation 68(1)(b) of the PCR 2015 it is stated that costs imputed to environmental externalities linked to the product, service or works during its life cycle can be considered provided their monetary value can be determined and verified. The area of life cycle costing and its operation in practice I consider need to be reviewed as part of my research on Contract Award Criteria.

(3) Framework Agreements

I selected the topic of Framework Agreements as in practice I have found that this form of procurement tool in the public sector has become very popular with contracting authorities.

This is confirmed in the recitals to Directive 2014/24/EU and it is stated that Framework Agreements are an efficient procurement technique. Due to the popularity in the use of Framework Agreements I have found a range of issues with the operation and transparency in the use of Framework Agreements and especially Call-off Contracts by contracting authorities. I set out these issues in this section to explain why Framework Agreements should form part of my research.

My experience in practice indicates that contracting authorities are not fully aware of the obligations in the procurement of Framework Agreements, this especially applies to the Call-off procedures from a Framework Agreement. Obligations such as the objective criteria which has been selected at the preliminary stages of establishing a Framework Agreement being used for Call-offs under the multi-supplier Framework Agreement have different interpretations by contracting authorities. This situation results in questions being asked not only regarding the awarding of Call-offs both as a direct award or by mini-competition but also the issue of transparency. The rules on Framework Agreements it is argued by one commentator³¹⁷ do not ensure enough transparency especially in the award of call-off contracts.

In practice the use of Framework Agreements by contracting authorities necessitated the clarification of the rules governing Framework Agreements and some of the clarifications have been made in Directive 2014/24/EU. These changes which contracting authorities and Central Purchasing Bodies are required to take into consideration in their procurements of Framework Agreements. Directive 2014/24/EU makes it clear that Call-offs based on a Framework Agreement may under certain circumstances last longer than the Framework Agreement itself, this being shown in Recital 62 of Directive 2014/24/EU.

Framework Agreements are covered by Article 33 of Directive 2014/24/EU³¹⁸ and Regulation 33 of the PCR 2015.³¹⁹ It is stated in Article 33(1) of Directive 2014/24/EU that Framework Agreements shall be concluded by using one of the Procedures in the Directive because a Framework Agreement is not a procurement procedure. This area I have found in

³¹⁷ Marta Andrecta, *Framework Agreements: Transparency in the Call-off Award process* (2015) 10(4) European Procurement and PPLR 227-230.

³¹⁸ Directive 2014/24/EU of the European Parliament and the Council of the 26th February 2014 on public procurement and replacing Directive 2004/18/EC.

³¹⁹ Statutory Instrument 2015 No. 102 – Public Procurement.

practice is not always clear to those undertaking the procurement process for a Framework Agreement.

Directive 2014/24/EU aims at improving the system of Framework Agreements³²⁰ and includes changes and clarifications to the provision for Framework Agreement rules to the legislations of Member States. This covers the classification of the technique of Framework Agreements, the longevity of Framework Agreements and the Call-offs from the Frameworks, the availability of two procurement methods under a Framework Agreement and new rules relating to multi-provider frameworks with direct award procedures³²¹.

Contracting authorities I have found in practice need to consider the key changes and clarifications covering the identity of all those authorities who can use the Framework Agreement which must be clearly stated at the time of call for competition or invitation to confirm interest has to be made.

A further element which I have found in practice relates to the identification of the proposed users must be made by either name or some other means that make them clearly identifiable, however this is not always followed. This is made by a link to a list of authorities where a clearly defined region, category of organisation or a classification such as local authority where they can be identified on the internet, an example in England and Wales being Inner or Outer London Boroughs or the reference to websites. This must be given in the Contract Notice so that the contracting authorities so listed or unequivocally identified are only those which can call-off from the Framework Agreement.

In relation to the issue of whether contracting authorities which are not a direct party or signatory to a Framework Agreement may use a Framework Agreement is a situation I can confirm I have experienced in practice. In a recent judgement by the Court of Justice of the European Union in *Autorità Garante della Concorrenza e del Mercato*³²², the Court confirmed that in order to be able to Call-off contracts from a Framework Agreement a contracting authority did not have to be a signatory. Instead it was enough for the contracting

³²⁰ Lichère F and Richetto S, *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 214

³²¹ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing Ltd. 2016) 222

³²² Case C-216/17, *Autorità Garante della Concorrenza e del Mercato-Antitrust*, *Coopservice Soc. Coop.arl*.

authority to appear to be a potential beneficiary of the Framework Agreement from the date when the Framework Agreement was concluded. It is accepted that the issues in the case in question were considered under the 2004/18 Directive however the Court's conclusions are equally relevant to Directive 2014/24/EU which contains provisions on Framework Agreements substantially like those in the now repealed 2004/18 Directive.

In Regulation 33(1) of the PCR 201 the procedures for the procurement of Framework Agreements must apply to the procedures from Part 2 of the PCR 2015 and must be selected by the Contracting Authority. The criteria for Price and Quality is also to be set for the Framework Agreement. The criteria for the Quality element must be objective and clearly stated in the procurement documents and in the Contract Notice. All the terms governing the provision of works, services and supplies together with any division of the procurement into Lots must also be stated in the procurement documents and the Contract Notice. These are areas I have found in practice that have not been followed in full or have only been applied in part.

In relation to multi supplier Frameworks there are now three potential ways to operate the Call-off procedure to select the provider and place specific Contracts. These are the procedures of Direct Award, mini competition and a mixture of direct award and mini competition. In practice the mini-competition methodology is more often used by contracting authorities although procedures contained within the Framework Agreement are not always followed producing transparency issues which not only impacts on suppliers and users of the Framework Agreement but indicates that the contracting authority is not acting in a transparent and proportionate manner.

Under the PCR 2015 there is an additional obligation for the procurement of Framework Agreements not only to be advertised by a Contract Notice in the EU *Official Journal* but in addition published on Contracts Finder. This obligation from my experience in practice is generally met, however the obligation under Regulation 112 of PCR 2015 for the awards of a Call-off from a mini-competition under a multi-supplier framework to be published on Contracts Finder is not always followed even though contained in CCS Guidance³²³ and this

³²³ Crown Commercial Service Procurement Policy Note – Legal requirements to publish on Contracts Finder – Action Note 07/16 18 July 2016 p3.

is one of the many transparency issues relating to the operation of Framework Agreements by contracting authorities.

(4) Abnormally Low Tenders

I selected abnormally low tenders as a topic as I have found in practice that this has been an area which has resulted in misunderstanding on the part of both contracting authorities and suppliers.

Where there is competitive market conditions and tight margins for suppliers, some bidders are prepared to submit uneconomic and unsustainable prices and offers. Such practices can significantly increase the risk of poor performance of the contract, create difficulties with sub-contractors and supply claims and either contribute to the creation of an adversarial culture or expand such a culture. On the other side, the public sector is also subject to financial pressure through reduced budgets and overall expenditure.

It has been recognised that an abnormally low tender can lead to a situation where the price offered by the bidder raises doubts as to whether the tender or offer is economically sustainable and will allow the proper delivery of the requirements of the contract.

In practice I have found that not all contracting authorities view abnormally low tenders in the same way which also applies to compliance with Regulation 69 of the PCR 2015. Some contracting authorities have guidance in place to objectively review whether a tender or an offer is potentially abnormally low and a process to demonstrate before, during and after award that the process adopted is open, fair and impartial. I have also found that some contracting authorities do not have any process in place and only rely on normal tender assessments and do not deal with abnormally low tenders. Many contracting authorities consider no action should be taken as there is no legal definition of what can be regarded as an abnormally low tender.

Within EU public procurement the concept of abnormally low tenders has long been recognised as having a significant role. As long ago as 1971 under Article 29 of Directive 71/305/EEC³²⁴ abnormally low tenders were covered.

In practice a tenderer submitting a low-priced bid may base this offer on legitimate and valid grounds due to having a competitive advantage based on specific methods of working or greater efficiency through a strong and price-controlled supply chain. Another reason for a tenderer submitting a low-priced bid which initially meets the pressures put upon contracting authorities to keep costs down is to ensure that the tenderer is awarded the contract only to negotiate prices upwards at a later stage. I have found that contracting authorities just consider the low price offered as assisting the contracting authority with its commitment to budgets.

In practice I have found that contracting authorities often consider two main elements in relation to abnormally low tenders, these being what if a bid is so low priced that it could ultimately lead to higher costs and/or performance and delivery issues either initially or over the duration of the contract or alternatively a challenge could be brought if the contract is awarded to a tenderer who is thought to have submitted an abnormally low price for the contract.

Case law³²⁵ on abnormally low tenders under earlier EU Directives focused on several areas such as the need to investigate individual situations and not to automatically eliminate a tender which appears to be considered as being abnormally low. In the case of *Slovensko*³²⁶ the CJEU found that there is an obligation on the part of a contracting authority to investigate abnormally low tenders even when they did not propose to reject them.

Due to the importance and impact of abnormally low tenders it has been said that the provisions on abnormally low tenders have undergone significant changes in Directive

³²⁴ Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.

³²⁵ Case 76/81 *Transporante et Travaux SA v Minister of Public Works* [1982] E.C.R. 417, Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] E.C.R. 1839, Case C-295/89 *Impresa Donà Alfonso et Figli s.n.c. v Consorzio per lo sviluppo Industriale del Comune di Monafalcone* [1991] E.C.R. 1-02967 and the Joined Cases C-147/06 and C-148/06 *SECAP SpA v Comune di Torino and Santorso Socooparl v Comune di Torino ("SECAP")* [2008] E.C.R. 1-3565

³²⁶ Case C-599/10 *SAG ELV Slovensko v Urad prevarejne obstaravanie* – Judgement of 29 March 2012.

2014/24/EU and these changes have been described as a revitalisation of the provisions.³²⁷ One of the changes is covered in Article 69(1) of Directive 2014/24/EU and Regulation 69(1) of the PCR 2015 and now states that contracting authorities shall require economic operators (tenderers) to explain the price or costs proposal in a tender where the tender appears to be abnormally low in relation to the works, supplies or services. As previously stated, contracting authorities should have processes in place that not only provide guidance for their staff but processes for dealing with abnormally low tenders and the action to be taken.

The absence of an EU definition of abnormally low tenders raises several problems to a contracting authority if it considers a tender as being abnormally low as it then has an obligation to investigate the matter. There is no explanation of a trigger point at which the contracting authority should require the tenderer to explain its tender. In addition, the word ‘appears’ does however leave room for manoeuvre and allows the contracting authority to seek an explanation without first rejecting the bid and then requesting an explanation later. This could suggest that a contracting authority needs in the first stage to carry out a *prima facie* assessment of the abnormally low character of a tender.³²⁸

Within Article 84(1)(c) of Directive 2014/24/EU and Regulation 84(1)(c) of the PCR 2015, the contracting authority must state in its Report on the procurement reasons for the rejection of tenders found to be abnormally low. In practice this is not always followed but some contracting authorities that have procedures on abnormally low tenders have other records and reviews of their processes.

3.3 Section 3 : Background to Directive 2014/24/EU

‘Public procurement plays a key role in the Europe 2020 strategy.’ This statement was set out in the 3 March, 2010³²⁹ Communication of the European Commission as one of the market-based instruments to achieve smart, sustainable and inclusive growth whilst ensuring the most efficient and effective use of public funds. For that purpose, it was felt that there

³²⁷ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing Ltd 2016) 146

³²⁸ Case T-392/015, *European Dynamics Luxembourg and Others*.

³²⁹ Europe 2020: A Strategy for smart, sustainable and inclusive growth March 3, 2010 Com (2010) 2020 final.

was a need to revise and modernise public procurement rules which had been laid down in the Public Sector Directive 2004/18/EC.³³⁰

Revisions to Directive 2004/18/EC were required as since the 2004 Directive came into force a hundred or so Judgements made by CJEU have fleshed out community law.³³¹ In 2010 in a Report to the President of the European Commission, Mario Monti recommended the need for simplification of the rules in the sense of reducing complexity, administrative burden on Small and Medium sized enterprises (SME) and to promote friendliness in public procurement.³³² It was further stated that there was the need to revise and modernise the public procurement rules laid down in the then current Directive 2004/18/EC and the Utilities Directive 2004/17/EC.³³³ Monti's Report also proposed that there should be a better use of public procurement in support of common social goals, clarifying basic notions and concepts which were to ensure legal certainty and to incorporate established case law of the CJEU.³³⁴ Monti's Report was submitted to the European Commission when they were drafting the Single Market Act

In the Single Market Act of 2010³³⁵, the European Commission announced its intention to introduce a range of legislative proposals to 'simplify and update' the EU procurement regime. The proposals included making the award of contracts more flexible as well as to enable public contracts to be used to support other EU policies.³³⁶

Following the adoption of the Single Market Act in 2010 and further demands voiced by a wide range of stakeholders in Member States for a major review of the EU public procurement system to consider its complexity and also increase efficiency and effectiveness,

³³⁰ Public Sector Directive 2004/18/EC of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts [2004] O.J. L134/1.

³³¹ Eric Van Abeele, 'The reforms of the EU's public procurement directives: a missed opportunity?' (Working paper 2012, 11 ETUI aisbi Brussels) 14.

³³² Report from Mario Monti to the President of the European Commission May 9, 2010 'A new strategy for the Single Market – at the Service of Europe's economy and society'.

³³³ Utilities Directive 2004/17/EC of 31 March 2004 co-ordinating the procurement procedures of entities in the water, energy, transport and postal services sector [2004] O.J. L358/35.

³³⁴ Constant De Koninck, Thierry Ronse and William Timmermans, *European Public Procurement Law, The Public Sector Procurement Directive 2014/24/EU explained through 30 years of Case Law by the Court of Justice of the European Union* (2nd edn, Wolters Kluwer 2015).

³³⁵ European Commission. Communications from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee for the Regions, 'Towards a Single Market Act 2010' Com (2010) 608 final/2

³³⁶ Sue Arrowsmith, *Modernising the EU Procurement Regime. A Blueprint for Real Simplicity and Flexibility* (Public Law Review 2012).

the European Commission confirmed its intention to issue legislative proposals by 2012 updating and reducing the complexity of the public procurement rules.

In January 2011 a consultation was launched with the publication of a Green Paper on the modernisation of EU public procurement policy entitled *Towards a more efficient European Procurement Market*³³⁷ by the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. Parallel with the Green Paper the Commission undertook an empirical evaluation of the impact and the cost of EU procurement policy.

An impact assessment of the proposals for a directive was undertaken by the Commission to underpin the 2011 evaluation of public procurement. The Green Papers were supplemented by consultations carried out by the Advisory Committee for Public Contracts. The impact assessment concluded that there were five main key problems identified. Among the causes were overly complex procurement rules and disproportionate and inflexible procedures.³³⁸

Although the Commission opened a debate and consultation on almost all the EU rules on public procurement and how these were operated, the consultation did not however extend to the EU Remedies Directives.

Within the Green Paper several questions were asked relating to purchasing activities and public contracts including views on procedures for the approach when purchasing goods and services and the important issues of whether selection and award criteria should be reviewed.

On the 27 January 2011 the Commission launched the start of a broad public consultation process with the publication of a Green Paper on the modernisation of EU public procurement policy.³³⁹

³³⁷ Green Paper on the modernisation of EU procurement policy, *Towards a more efficient public procurement market* (COM 2011 15 final)

³³⁸ Eric Van den Abeele, *The reform of the EU's public procurement directives : a missed opportunity?* (Working paper 2012.11 ETU1 aisbi Brussels) 21

³³⁹ European Commission, Green Paper on the modernisation of EU public procurement policy: *Towards a more efficient European Procurement Market* COM (2011) 15 final.

In a subsequent communication of the 13 April, 2011 from the European Commission on the “*Single Market Act : Twelve levers to boost growth and confidence*”,³⁴⁰ the Commission set out twelve key priority actions to be adopted by the institutions of the EU before the end of 2012 for the modernisation of the framework of public procurement legislation. The Commission also stated that they would make legislative proposals for the revision of and the modernisation of public procurement legislation to enable the award of contracts to be easier and to provide a flexible set of procurement procedures for contracting authorities including the award criteria for contracts.

The Green Paper identified several key areas of reform and sought from stakeholders their views on proposals for changes in legislation. A range of issues were covered for review, these being the combating of favouritism, corruption, conflicts of interest together with the need for more simple and flexible procedures. Further matters were listed such as the use of public procurement to provide other policy objectives and improving access for the SMEs in public procurement. The Commission in parallel with the Green Paper undertook an evaluation of the cost and impact of the procurement policy of the EU which was also published in 2011.³⁴¹ It was said that unlike the Report by Monte, the Green Paper was not enthusiastic about increasing flexibility and providing greater commercial freedom for procuring entities.³⁴²

The Commission took into consideration the results from the public consultation, the Commission’s comprehensive evaluation on the impact and effectiveness of EU legislation and two resolutions of the European Parliament concerning the modernisation of public procurement procedures,³⁴³ The Commission then published on the 20 December 2011 a legislative package and proposals for the revision and update of Directive 2004/18/EC and Directive 2004/17/EC as well as the adoption of a proposed Directive on Concessions Contracts.

³⁴⁰ Communication from the Commission to the European Parliament, The Economic and Social Committee and the Committee of the Regions COM (2011) 206/4

³⁴¹ European Commission, European Commission Staff Working Paper, Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation 27 June 2011 SEC (2011) 853 final.

³⁴² Sue Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the UK and EU* (3rd edn, 1 Sweet & Maxwell 2014) 199

³⁴³ European Parliament resolution of 18 May 2010 on *new developments in public procurement* and European Parliament Resolution of 25 October 2011 on *modernisation of public procurement*.

The Commission's 2011 Proposals sought to achieve several goals including in particular a simplification of and making more flexible the existing procurement rules which in turn would make public procurement easier and administrative processes less burdensome.

Within the framework of the legislative process and following the 2011 Proposal, the President of the Council published six Compromise Texts which proposed several amendments. A commentator has said that it is not possible to determine with any certainty whether the Parliament was inspired for some details by the Council President's Compromise Texts or whether each institution independently determined similar proposals.³⁴⁴

After further negotiations and consultation and a short legislative process three Directives were adopted by the Council on the 11 February 2014, published in the EU's Official Journal on March 2014 and then came into force on 17 April 2014. Member States had until 18 April 2016 to transpose the new rules into their national law with one exception relating to the obligations to use e-procurement which had a deadline of the 18 October 2018.

Directive 2014/24/EU is comprised of 138 Recitals and 94 Articles together with Annexes referred to as I to XV, Annex V containing Parts A to J inclusive.

3.4 Section 4 : Changes, modifications and reforms introduced by Directive 2014/24/EU³⁴⁵

As a fundamental element of my research I focused on and carried out an analysis of the rules and laws to ascertain the changes, modifications and reforms. From my analysis I set out below the following changes, modifications and reforms brought about by Directive 2014/24/EU which I have classified into two categories, the first being references relating to the four topic areas examined in my research and the second on other changes and reforms introduced by the Directive.

³⁴⁴ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of the EU Public Procurement Rules*. (Edward Elgar Publishing Ltd.2016) 23

³⁴⁵ Directive 2014/24/EU of the European Parliament and of the Council of the 26 February 2014 on public procurement and replaces Directive 2004/18/EC.

3.4.1 Reforms relating to the four topic areas examined in my research concerning Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders

Contracting authorities must now only base the award of public contracts on the most economically advantageous tender (MEAT). The most economically advantageous tender has to be identified on the basis of the price or cost and also may include the best price-quality ratio which shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject matter of the public procurement in question.³⁴⁶ The most economically advantageous tender can also be identified using cost effective approaches such as life cycle costing.³⁴⁷

Added to the list of contract award criteria is the experience of staff assigned to perform a contract may be used where the staff so assigned can have a significant impact on the level of performance of the contract.³⁴⁸

Directive 2014/24/EU states in relation to economic and financial standing that contracting authorities may impose a requirement to ensure suppliers (economic operators) possess the necessary economic and financial capacity to perform a contract. In particular contracting authorities may require an economic operator / supplier to have a minimum yearly turnover of two times the estimated value of a contract including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios for instance between assets and liabilities. This provision is included within Article 58(3) of Directive 2014/24/EU except in clearly justified cases relating to the nature of the works, services or supplies. In relation to contracts based on Framework Agreements, where they are to be awarded following a reopening of competition, the maximum yearly turnover requirements shall be calculated on the basis of expected contracts that will be performed at the same time or when it is not known then the estimated value of the Framework Agreement.

Article 69 of Directive 2014/24/EU contains provisions on abnormally low tenders with the introduction of two new obligations to verify all tenders that appear to be abnormally low and

³⁴⁶ Directive 2014/24/EU, 90th recital; Art. 67 paragraphs 1 and 2.

³⁴⁷ Directive 2014/24/EU, 95th and 96th recital; Art. 68.

³⁴⁸ Directive 2014/24/EU, 94th recital; Art. 67 paragraph 2(b).

to reject a tender or tenders because they are abnormally low based on non-compliance with applicable social, environmental and/or labour law provisions.³⁴⁹

To achieve efficient public procurement there have been changes in Directive 2014/24/EU to allow contracting authorities to award contracts in separate lots and to strengthen demand aggregation techniques.³⁵⁰ Thus under Directive 2014/24/EU contracting authorities have a duty to consider whether it is appropriate to divide a contract into lots and if such a division is made the procurement documents have to state the main reasons for implementing this methodology.

The provisions in Directive 2014/24/EU relating to Framework Agreements³⁵¹ have the aim of improving the systems for the use of frameworks although Recital 60 of Directive 2014/24/EU confirms that the law is maintained as it is. Other Recitals to Directive 2014/24/EU state that Framework Agreements are considered to be an efficient procurement technique. There are however some clarifications such as once a Framework Agreement is concluded it should not be opened to permit the entry of new economic operators (suppliers). In addition, where a multi-supplier Framework Agreement is in operation there is no longer the requirement for at least three suppliers to be appointed to the Framework. There is also a third provision in respect of a call-off from a multi-supplier Framework Agreement. The maximum duration of a Framework Agreement remains at four years, but a longer period may be justified in exceptional cases. Individual contracts based on a Framework Agreement do not now need to expire at the end of the four-year period of the Framework Agreement. The term can be longer as set out in Recital 62 to Directive 2014/24/EU.

The provisions in Directive 2014/24/EU in relation to the choice of participants and the award of contracts,³⁵² now state that in relation to the use of the Open Procedure, contracting authorities may decide to examine tenders before considering selection criteria including exclusion measures. This appears to simplify the process but has both advantages and disadvantages. Directive 2014/24/EU does not however state whether a contracting authority

³⁴⁹ Directive 2014/24/EU, recital 103; Art. 69 and Art. 18.

³⁵⁰ Ignacio Herrera Anchustegui, 'Division into lots and demand aggregation – extremes looking for the correct balance?' in G Skovgaard Ølykke and A Sanches-Graells (eds), *Reformation or Deformation of EU Procurement Rules* (Edward Elgar Publishing 2016) 125.

³⁵¹ Directive 2014/24/EU, recital 60 to 62; Art. 33.

³⁵² Directive 2014/24/EU, recital 69; Art. 37.

must indicate to tenderers that this methodology is to be operated. In the absence of any provisions in Directive 2014/24/EU there is the possibility that contracting authorities could decide to operate the methodology of examination after receipt of tenders.

Directive 2014/24/EU sets out measures in relation to the prior involvement in the procurement process of Candidates or Tenderers³⁵³ including the action to be taken prior to any exclusion. These measures are in place to ensure that competition is not distorted by the prior engagement of a future tenderer. There is a link to the provision in Article 40 of Directive 2014/24/EU relating to Preliminary Market consultations taking place before the launch of a procurement procedure.

There are new mandatory exclusion grounds³⁵⁴ which have been included in Directive 2014/24/EU together with two new discretionary exclusion clauses. One of these provisions is where a contracting authority can demonstrate a violation of applicable obligations referred to in Article 18(2)³⁵⁵ of Directive 2014/24/EU. The second is where an economic operator / supplier has shown persistent or significant deficiencies in the performance of a substantive requirement under a prior public contract which must have led to early termination of a contract, damages or other comparable sanctions.³⁵⁶ Four other additional discretionary exclusion grounds have also been included, these relating to agreements distorting competition, conflicts of interest, prior involvement and illicit behaviour. All the discretionary exclusion grounds are covered within Article 57 of Directive 2014/24/EU.³⁵⁷

Article 58(1) of Directive 2014/24/EU clarifies that selection criteria can exclusively relate to three areas, the suitability to pursue the professional activity concerned, the economic and financial standing and the technical and professional ability of the economic operator / supplier. All requirements shall however be related and proportionate to the subject matter of the contract. In relation to selection criteria, Directive 2014/24/EU introduces and refers to the use of the European Single Procurement Document (ESPD)³⁵⁸ which is an updated self-declaration. The ESPD could result in considerable simplification for the benefit of both

³⁵³ Directive 2014/24/EU, Art. 41.

³⁵⁴ Directive 2014/24/EU, Art. 57, 60 and 61.

³⁵⁵ Directive 2014/24/EU, Art. 18(2) Annex X.

³⁵⁶ Directive 2014/24/EU, Art. 57(4)(g).

³⁵⁷ Directive 2014/24/EU, Art. 57.

³⁵⁸ Directive 2014/24/EU, Art. 38.

contracting authorities and economic operators / suppliers at the time of submission of requests to participate or of tenders for a contract. Contracting authorities must accept the ESPD as an updated, self-declaration document.

Article 71 of Directive 2014/24/EU contains provisions relating to sub-contracting in three areas. Two of these provisions concern information on sub-contractors to be provided by tenderers and compliance of sub-contractors with exclusion criteria, environmental, social and labour law. Observance of these obligations by sub-contractors are also covered in Article 18(2) of Directive 2014/24/EU. In the procurement documents a contracting authority can ask a tenderer to indicate any share of a contract it intends to sub-contract. There is a further provision which relates to the possibility to arrange for direct payment and liability of sub-contractors.

3.4.2 Other changes and reforms introduced

The distinction between Priority and Non-Priority Services (the so-called Part A and Part B Services) has been abolished. The full application of the European procurement rules now apply to all Service Contracts, the only exception being a ‘light procurement regime’ for certain social, health, cultural, hotel and restaurant and rescue services which are contained within Annex XIX of the Directive 2014/24/EU.³⁵⁹ Certain services previously covered by Part B, notably legal services involving services for the representation of Clients in Judicial Proceedings by Lawyers³⁶⁰ are now excluded from Directive 2014/24/EU. All other legal services now fall under the light procurement regime covered by Article 74.

Threshold amounts³⁶¹ have not changed but there is now a requirement for the Commission within a period of 60 months of the entry into force of Directive 2014/24/EU on the 18 April, 2019, to undertake negotiations to increase the WYP GPA thresholds which are linked to the setting of EU thresholds. There is however a new threshold introduced for social and other specific services listed in Annex XIV of Directive 2014/24/EU.

³⁵⁹ Directive 2014/24/EU, Art. 4(d)

³⁶⁰ Directive 2014/24/EU, 25th recital; Art. 10(d)

³⁶¹ Directive 2014/24/EU, Art. 4

It is confirmed that in the area of loans whether in respect of securities or other financial instruments are now clearly excluded from the scope of Directive 2014/24/EU.³⁶²

There are now explicit rules on changes on existing contracts during the term of such a contract. Directive 2014/24/EU has in Article 72 codified the *Presstext Nachrichtenagentur v Austria*³⁶³ case by bringing legal clarity and specifying the circumstances under which existing contracts during their term may be modified without the need for a new procurement procedure.³⁶⁴

New explicit rules on the arrangements for ‘in-house’ procurements and the in-house exception are covered.³⁶⁵ The rules codify those already developed in the ‘*Teckal*’³⁶⁶ judgement but state in more detail how they are to be applied to confirm certainty.³⁶⁷

There is now in the 2014/18/EU Directive new explicit provisions governing joint procurement by more than one entity and joint procurement by entities of different Member States.³⁶⁸ This is a codification of law case. Member States now must take measures to ensure that during the performance of public contracts suppliers are to comply with those obligations which are applicable in the fields of Environmental, Social and Labour Law. This is covered by Annex X to the 2014/18/EU Directive.

The use of electronic communications³⁶⁹ is now mandatory which is included to simplify the publication of public procurement contracts. The operation of electronic communication adds to the efficiency and transparency of the procurement process.³⁷⁰

³⁶² Directive 2014/24/EU, 26th recital; Art. 10(f)

³⁶³ Case C-454/06 *Presstext Nachrichtenagentur v Austria* [2008] E.C.R. 1-04401

³⁶⁴ Abby Semple *A Practical Guide to Public Procurement* (OUP 2015) 133

³⁶⁵ Directive 2014/24/EU, 31st and 32nd recitals; Art. 12 paragraphs 1 to 3 and 5

³⁶⁶ Case C-107/98 *Teckal Srl v Commune Design and Install Viano (Reggio Emilia)* [1999] E.C.R. 1-08121

³⁶⁷ Constant De Koninck, Thierry Ronse and William Timmermans, *The public sector procurement Directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (2nd edn, Wolter Kluwer 2015) 5

³⁶⁸ Directive 2014/24/EU, Art. 38 and 39

³⁶⁹ Directive 2014/24/EU, 105th recital; Art. 18 paragraph 2

³⁷⁰ Constant De Koninck, Thierry Ronse and William Timmermans, *The public sector procurement Directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (2nd edn, Wolter Kluwer 2015) 7

A new procedure of Competitive Procedure with Negotiation³⁷¹ has been introduced which unlike its predecessor, the negotiated procedure, is available for all procurement which is not 'off the shelf purchasing'. In relation to procedures, the availability of the Competitive Dialogue has been extended.³⁷² A further new specific procedure has been introduced of Innovative Partnership³⁷³ where there is a need for the development of innovative products, works and services and the subsequent procurement of these elements cannot be made by existing solutions.³⁷⁴

Directive 2014/24/EU introduces a light procurement regime for certain social, health, education and cultural and related services³⁷⁵ which are set out in Annex XIV of Directive 2014/24/EU. There is also a provision for a lighter procurement regime for non-central contracting authorities³⁷⁶ where a contract is awarded using the restructured procedure or competitive procedure with negotiation. The use of a prior information (PIN) can be used as a call for competition where the PIN fulfils certain conditions.

A further change in Directive 2014/24/EU relates to the minimum time limits which contracting authorities must allow to bidders to respond to notices or submit their tenders.³⁷⁷ This provision has been introduced to make procedures faster and more efficient and the time limits for participation in procurement procedures are to be kept as short as possible without creating undue burdens for economic operators. Contracting authorities when reviewing their provisions should in addition consider the complexity of a contract and the time for their own organisation to prepare the procurement documents.

The rules on Dynamic Purchasing Systems³⁷⁸ have been greatly simplified. Under Directive 2014/24/EU only the dynamic purchasing system itself will need to be advertised on OJEU³⁷⁹ and not the call-off contracts as previously published. Call-off contracts are subjected to a more straight forward set of procedures like awarding contracts under a mini-competition

³⁷¹ Directive 2014/24/EU, 90th recital; Art. 26, paragraph 4 and Art. 29

³⁷² Directive 2014/24/EU, 42nd and 45th recital; Art. 26 paragraph 4 and Art. 30

³⁷³ Directive 2014/24/EU, 49th recital; Art. 31

³⁷⁴ Sue Arrowsmith, *The law of public and utilities procurement regulation in the EU and UK* (Sweet & Maxwell 2014) 1046 & 1047

³⁷⁵ Directive 2014/24/EU, Art. 74.

³⁷⁶ Directive 2014/24/EU, Art. 26 paragraph 5 and Art. 48 paragraph 2.

³⁷⁷ Directive 2014/24/EU, recital 80; Art. 27.

³⁷⁸ Directive 2014/24/EU, recital 63 to 66; Art. 34.

³⁷⁹ Official Journal of the European Union.

from a Framework Agreement. Contracting authorities will now have to follow the rules for the Restricted Procedure for the procurement instead of the Open Procedure previously used under the old rules.³⁸⁰

The new rules in Directive 2014/24/EU clarify the activities of Central Purchasing Bodies either to purchase directly or as an intermediary by awarding contracts, operating Dynamic Purchasing Systems or concluded Framework Agreements to be used by contracting authorities.³⁸¹

New rules have been introduced in Directive 2014/24/EU for Occasional Joint Procurement³⁸² between two or more contracting authorities and Directive 2014/24/EU sets out principles of joint procurement and two provisions for their use and conduct.

Within Article 73 of Directive 2014/24/EU there are provisions for contracting authorities in Member States to have the terms determined by national law for the termination of a public contract if so required by Union law.³⁸³ There are two situations cited, the first being where a contract has been subject to substantial modification or changes that constitutes a new contract. The second is where it is discovered after the award of a contract that the contractor should not have in fact been awarded the contract due to a serious infringement of obligations under Directive 2014/24/EU.

Article 56(3) of Directive 2014/24/EU confirms that contracting authorities can contact tenderers in relation to various types of corrections to their submitted documentation. The Article also confirms that the general principles of transparency and equal treatment must apply. To allow verification by contracting authorities when purchasing works, supplies or services in respect of social, environmental or other characteristics they can under the new rules obtain specific labels as means of proof that the works, supplies or services correspond to the required characteristics.³⁸⁴

³⁸⁰ Ama Eyo, *Evidence on the use of Dynamic Purchasing Systems in the United Kingdom* [2017] 26(6) PPLR 238

³⁸¹ Directive 2014/24/EU, recital 69 Art 37.

³⁸² Directive 2014/24/EU, Art. 38.

³⁸³ Directive 2014/24/EU, recital 112.

³⁸⁴ Directive 2014/24/EU, recitals 74 and 75; Art. 43.

There is within Article 77³⁸⁵ of Directive 2014/24/EU provisions for the reserved right of contracting authorities in Member States to allow the participation of organisations in the award procedures for public contracts exclusively for those health, social and cultural services referred to in Article 74 of Directive 2014/24/EU.

3.5 Section 5 : Literature on the simplification and flexibilisation of the rules in Directive 2014/24/EU

This section considers simplification and flexibilisation and contains the views of several stated commentators on simplification and flexibilisation of the rules in Directive 2014/24/EU.

The European Commission in a document entitled ‘Internal Market, Industry entrepreneurship and SMEs’³⁸⁶ sets out areas which it considers simplify and makes flexible the rules. In relation to simplifying the rules the Commission states that simplification of the rules for contracting authorities ensures better quality and value for money in the procurement process. The Commission also cites that in relation to simplification the new types of selection procedures enable more choice, provide better areas for economic operators / suppliers which then produces better results. Within the body of the Commission’s document under a heading of flexibility, the following references are cited.

- The contract award procedures give contracting authorities a more flexible and efficient procurement process.
- Shorter time periods.
- The ability to select the best quality-price ratio.
- The use of the European Single Procurement Document.
- They can enquire whether goods, works and services comply with social standards or environmental requirements.
- Permit the exclusion of a bidder from a procedure.
- A provision for the assessment of qualification and experience of staff assigned to perform a contract especially service contracts.

³⁸⁵ Directive 2014/24/EU, recital 118; Art. 77.

³⁸⁶ EU Commission, *Internal Market, Industry entrepreneurship and SMEs*
<https://ec.europa.eu/info/departments/internal-market-industry-entrepreneurship-and-SMEs>

- A simplified publication system for so called sub-central authorities.

Treumer stated in *Evolution of the EU Public Procurement Regime*³⁸⁷ that the primary objective of the revisions to be made to the EU public procurement regime including the new Public Procurement Directive was to provide simplification and flexibilisation of the regime.

In relation to the views of a number of commentators on simplification and flexibilisation of the rules, there have been a wide range of statements. It was predicted by Treumer in *Flexible Procedures or Ban or Negotiation*³⁸⁸ that simplification of the rules was ‘highly unlikely’. To confirm this point another commentator Arrowsmith in *The New Procurement Directives*³⁸⁹ stated that the European legislature failed in simplifying the regime and many of the changes introduced greatly complicated the system.

Treumer further stated that the number of Recitals to Directive 2014/24/EU have increased to 138 and that as many of these Recitals contain obligations for the interpretation of the rules they should have for simplification purposes been part of the Articles.³⁹⁰ The same commentator has said that the objective of simplification was absolutely unrealistic to achieve unless the approach of those drafting the rules had completely changed.

The European Commission set out several aims for the new Directive including the simplification of award procedures and through flexibilisation of the rules to increase the use of procurement. Within the simplification arrangement social, cultural and health services were covered. Regarding the simplification and flexibility DeKoninck et al in *European Public Procurement Law*³⁹¹ said that all the stated aims are not easily attainable, and more could have been done. The same commentators have said that the new rules are easier to read

³⁸⁷ Steen Treumer, ‘Evolution of the EU Public Procurement Regime’ in Francois Lichère, Roberto Caranta, Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 9&10

³⁸⁸ Steen Treumer, ‘Flexible Procedures or Ban or Negotiations? Will more negotiations limit the access to the procurement market’ in Grith Skovgaard Ølykke, Carina Hansen, Tvarno (eds), *EU Procurement – Modernisation, Growth and Innovation* (DJØF Publishing 2012) 147.

³⁸⁹ Sue Arrowsmith, ‘Special issue – The New Procurement Directives’ (2014) Part 1 Editor’s Note’ PPLR 81.

³⁹⁰ Steen Treumer, ‘Flexible Procedures or Ban or Negotiations? Will more negotiations limit the access to the procurement market’ in Grith Skovgaard Ølykke, Carina Hansen, Tvarno (eds), *EU Procurement – Modernisation, Growth and Innovation* (DJØF Publishing 2012) 147.

³⁹¹ Constant DeKoninck, Thierry Ronse and William Timmermans, *European Public Procurement Law: The Public Sector Procurement Directive 2014/24/EU explained through 30 years of Case Law by the Court of Justice of the European Union* (2nd edn, Wolters Kluwer 2015) 20.

and provides a more complete overview however it remains to be seen whether Directive 2014/24/EU has been simplified which in turn would allow contracting authorities to run award procedures more easily.

Regarding multi-provider/supplier Framework Agreements Andrecka in *Clarification or missed opportunity?* said that the two procurement methods allowed under one Framework Agreement together with the new procedure have added flexibility.³⁹²

In relation to Dynamic Purchasing Systems (DPS) Eyo³⁹³ states that the EU adjusted the rules on Dynamic Purchasing System to simplify the process of setting up and operating the mechanism through provisions in Article 34 of Directive 2014/24/EU.

Article 56(3) of Directive 2014/24/EU is a new provision where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous. Contracting authorities may require economic operators to submit or supplement the documentation or information provided. All such requests are to be in full compliance with the principles of equal treatment and transparency. This provision is said by Hamer in *Requesting addition information-increase of flexibility and competition*³⁹⁴ to create a more flexible approach as well as placing an emphasis on competition.

Another commentator³⁹⁵ stated that the problem with simplification is that it has different meanings for the various procurement stakeholders and although both sides want simplification, what is meant by it is very different. The same commentator said that there is an intrinsic contradiction between simplification and flexibility when it is considered in the regulation of public procurement

³⁹² Marta Andrecka, 'Clarification or missed opportunity? The provision of Framework Agreements in the 2014 Directive' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds) *Reformation or Deformation of the EU Public Procurement Rules* (9 Edward Elgar Publishing 2016) 220 & 235

³⁹³ Ama Eyo, *Evidence on the use of Dynamic Purchasing Systems in the United Kingdom* [2017] 26(6) PPLR 240

³⁹⁴ Carina Risvig Hamer, 'Requesting addition information-increase of flexibility and competition' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds) *Reformation or Deformation of the EU Public Procurement Rules* (10 Edward Elgar Publishing 2016) 252

³⁹⁵ Simplification for whom – Telles.eu. March 28 2017 <http://www.telles.eu/blog/2017/3/28/simplification-for-whom>

Treumer also said in *Evolution of the EU Public Procurement Regime*³⁹⁶ that the European legislature failed in simplifying the EU public procurement regime and the procurement regime remains a lawyer's paradise.

With respect to simplification and flexibility, within Directive 2014/24/EU, Arrowsmith in *Modernising the EU's public procurement regime: A Blueprint for real simplicity and flexibility*³⁹⁷ has stated that there should have been a single Directive instead of the three current Directives, these being Public Sector Procurement, Utilities and Defence and Security. A single set of rules would have created greater simplification and flexibility which in turn would encourage the main objectives of the proposed reform programme. It should be noted that Arrowsmith made the aforesaid statement in 2012 but this has been included by way of reference in relation to the overall statements on simplification and flexibility.

3.6 Section 6 : Further provisions and specific reforms under the PCR 2015

3.6.1 General introduction

At the outset it should be noted that this section contains an overview of the reforms and additional obligations within the PCR 2015.³⁹⁸ In view of the UK's constitutional arrangements the transposition of the EU Procurement Directive had to take into consideration the devolved administrations of Wales, Scotland and Northern Ireland. This resulted in the transposition of Directive 2014/24/EU into two sets of rules, one set for England, Wales and Northern Ireland and the second for Scotland.³⁹⁹ My research does not cover procurement law in Scotland and so only the package of law in England, Wales and Northern Ireland is analysed.

A broad basis of public consultation was carried out as part of the preparation of the PCR 2015 during which it was made clear there is only limited scope for the Government and other UK stakeholders to influence the substantive content of the UK implementing

³⁹⁶ Steen Treumer, 'Evolution of the EU Public Procurement Regime' in Francois Lichère, Roberto Caranta, Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 9

³⁹⁷ Sue Arrowsmith, *Modernising the EU's public procurement regime: A Blueprint for real simplicity and flexibility* (2012) 21 PPLR 71.

³⁹⁸ Statutory Instrument 2015 No. 102 – Public Procurement

³⁹⁹ Albert Sanches-Graells, *The copy-out of Directive 2014/24/EU in the UK and its limited review despite the imminence of Brexit* (2019) 5 PPLR 186&187

regulations.⁴⁰⁰ Most of the provisions in the Directive are mandatory for Member States to transpose so the UK Government cannot alter the substance of the transposition. The UK Government's policies on 'copy-out' of the European Directives and the avoidance of gold plating further limit the extent that the UK Government can deviate from the wording of the Directives when preparing the notional UK implementing regulations. The use of the 'copy out' of Directive 2014/24/EU to avoid 'gold plating' and limit the extent to which the Cabinet Office could deviate from the wording of the EU Directive when preparing UK implementing regulations was confirmed by Butler in *Exclusion, Qualification and Selection under the UK PCR 2015: the Copy-Out Copycat*.⁴⁰¹ Further confirmation of the 'copy-out' process was contained in an Explanatory Memorandum on PCR 2015.⁴⁰²

The transposition process was undertaken very speedily, however PCR 2015 had to be amended by the *Public Procurement (Amendment, Repeals and Revocations) Regulations 2016*.⁴⁰³ This action had to be taken in order to correct a relatively large number of technical problems within the text of the PCR 2015 and in particular to ensure compatibility with the EU law. As changes in drafting had introduced substantive deviations from the EU rules.⁴⁰⁴ To assist the understanding of users in practice of the rules in the PCR 2015, a set of guidelines and soft law instruments were prepared by the Crown Commercial Service (CCS). In addition, following the transposition of PCR 2015 the CCS adopted and issued specific subject matter guidance on a wide range of issues⁴⁰⁵ for contracting authorities to consider when undertaking public procurement.

There are however obligations which in transposing the PCR 2015 have gone beyond Directive 2014/24/EU and there are several specific additional obligations for contracting authorities to comply with and these are included in this section under paragraph 3.6.2.

⁴⁰⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/356492/Consultation_Document_UK_Transposition_of_new_EU_Procurement_Directives_Public_Contracts_Regulations_2015.pdf (page 9)

⁴⁰¹ Luke Butler, *Exclusion, Qualification and Selection in Public Procurement* (DJØF Publishing 2015).

⁴⁰² See <https://www.legislation.gov.uk/uksi/2015/102/memorandum/contents>

⁴⁰³ Statutory Instrument 2016 No. 275.

⁴⁰⁴ Albert Sanchez-Graells, *The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit* (2019) 5 PPLR 186.

⁴⁰⁵ See <https://www.gov.uk/guidance/transposing-eu-procurement-directives>

3.6.2 Additional obligations under the PCR 2015.

There are additional obligations on contracting authorities under PCR 2015 of which they should be fully aware when undertaking procurements. A number of the obligations give effect to a number of recommendations made by Lord Young initially in a two part Report, the first part published in 2012⁴⁰⁶ and the second in 2013.⁴⁰⁷ A further Report on Small Firms 2010-2015⁴⁰⁸ was published which contained recommendations for promoting small and medium sized enterprises.

The additional obligations for contracting authorities are contained in Part 4, numbers 105 to 113, under the heading of ‘Miscellaneous Obligations’ in Chapter 7 of the PCR 2015. These Regulations cover transparency of information, qualifications and the process for the reduction in the number of suppliers to be invited to tender in the award procedure. Regulation 113, also in Part 4 but under the section headed Miscellaneous provisions, relates to the payment of undisputed invoices not only by contracting authorities but contractors and sub-contractors.

Contracting authorities, as well as being aware of all the obligations, are also required to follow the obligations and additional rules contained in Part 4 of PCR 2015. There is guidance issued by the Crown Commercial Service on some of these new rules. Parts of the guidance are in fact statutory guidance which is legally binding and enforceable in the courts.

In relation to the provisions and obligations, Regulation 105 of the PCR 2015 covers the scope of additional rules and Regulations 106 to 108 of the PCR 2015 contain the obligations. Regulation 105(1) of PCR 2015 states that the obligations apply to all procurements within the scope of Part 2 of the PCR 2015 which in turn sets out all the obligations required under Directive 2014/24/EU.

Regulation 106 of the PCR 2015 requires the publication of information on contract opportunities by a contract notice in the EU *Official Journal* and also on Contracts Finder

⁴⁰⁶ Lord David Young, Make Business your Business: A Guide to Starting and Developing a New Business, (First Part) May 2012.

⁴⁰⁷ Lord David Young, Growing your Business: A Report on Growing Micro Businesses (Second Part) May 2013.

⁴⁰⁸ Lord David Young, The Report on Small Firms 2010-2015 (Prime Minister’s Office 2015) 24.

which is a national data base of contract opportunities and other information on public contracts.⁴⁰⁹ The Guidance Note also recommended that legal advice should be taken if unsure of the effect of the Regulations. In a subsequent Procurement Policy Note – Promoting Greater Transparency⁴¹⁰ published by the CCS, it was confirmed that any new procurement opportunities above the public procurement thresholds are to be published on Contracts Finder. Information is provided in Regulation 106(1) of the PCR 2015 for when a notice must be published on Contracts Finder with Regulation 106(2) of the PCR 2015 setting out the information that must be included in the notice.

To assist contracting authorities the CCS published another Guidance Note on the new transparency requirements for publishing on Contracts Finder⁴¹¹ which confirmed that the guidance underpins Regulations 106, 108, 109, 110 and 112 of the PCR 2015.

Regulation 108 of the PCR 2015 contains an additional obligation to publish a notice containing information on contract awards on Contracts Finder as well as the EU's *Official Journal*, this also applies to Regulation 75(3) of the PCR 2015 relating to light regime services. Regulation 108(1)(b) of the PCR 2015 incorporates a transparency obligation to publish on Contracts Finder where a contracting authority awards contracts from a Framework Agreement. This is an important obligation as in the past the degree of transparency in relation to call-offs from Framework Agreements has been very poor. It is unclear from the rules whether the value of call-offs which are below the relevant EU threshold falls into this requirement, however in paragraph 7 of the CCS Guidance previously referred to, it is stated that call-offs awarded above the relevant threshold are to be published.

Chapter 8 in Part 4 of the PCR 2015 covers Regulations 109-112 which relates to obligations on Below Threshold Procurements. This is a new set of Regulations introduced by the UK Government. Regulation 109 covers the scope of what is contained in Chapter 8 and Regulations 110 and 112 relate to the publishing of contract opportunities and information on

⁴⁰⁹ Crown Commercial Service Policy Note 07/16; Legal requirements to publish on Contracts Finder 19 July 2016.

⁴¹⁰ Crown Commercial Service, Procurement Policy Note – Promoting Greater Transparency, Information Note PPN 02/17 December 2017.

⁴¹¹ Crown Commercial Service, Guidance on the new transparency requirements for publishing on Contracts Finder, March 2015.

Contracts Finder covering contract awards for below threshold procurements, the foundation for which is set out in Regulation 109 of the PCR 2015.

In addition to the rules on the process of selection and inclusion in Directive 2014/24/EU and those in Regulations 57-65 of the PCR 2015, further rules are included under Regulation 107(1) in relation to qualitative selection and exclusion under Regulation 107(2) with Regulation 107(3) providing some guidance on qualitative selection and assessment.

The qualitative selection provisions in Regulation 107(1) were subsequently revisited when in September 2016 the CCS published *Procurement Policy Note 8/16 : Standard Selection Questionnaire (SQ)*.⁴¹² This requirement for the SQ replaces previous guidance and sets out in four Annexes the use of the SQ with lists of mandatory and discretionary grounds for exclusion and some further guidance. To assist contracting authorities the CCS provided some further guidance in that the SQ does not apply to works contracts and contracting authorities should use the PAS91⁴¹³ pre-qualification questionnaire.

Annex B to the standard SQ is divided into three parts. Part 1 covers details of the bidder, Part 2 covers the mandatory and discretionary grounds for exclusion and Part 3 states the selection criteria for suitability to pursue a professional activity, economic and financial standing and technical and professional ability. Contracting authorities required to use the questions in Parts 1 and 2. There is some flexibility in Part 3 but if modifications are made, they must be reported to the CCS as deviations in accordance with the statutory guidance. There is an exception to the reporting requirement where the additional questions in Part 3 are project specific.

In January 2016 the European Commission published the European Single Procurement Document (ESPD) in electronic format⁴¹⁴ for the Member States to adopt and is covered in Article 59 of Directive 2014/24/EU. For contracting authorities operating the PCR 2015, the CCS confirmed that they are obliged to accept the ESPD template for self-certification of exclusion grounds. The statutory guidance provides further information and requires

⁴¹² Crown Commercial Service Procurement Policy Note 8/16: Standard Selection Questionnaire (SQ).

⁴¹³ Publicly Available Specification PAS 91: 2017 + A1, British Standards Institution.

⁴¹⁴ Commission Implementing Regulations (EU) 2016/17 to establish the standard form for the European Single Procurement Document [2016] OJ L3/16.

contracting authorities to tell the economic operators how they can access the SQ and the options available. This is to provide clarity to economic operators regarding the format required for submission.

Arrowsmith said that the additional obligations in the PCR 2015 on transparency and selection which were based on Lord Young's reports add to the administrative load of those awarding contracts by adding to the already high burden involved in seeking to apply a rather detailed, complex and often unclear regulatory regime.⁴¹⁵ Thomas⁴¹⁶ reported that the UK Government guidance with regard to the use of 'Contracts Finder' threshold for sub-central contracting authorities has been found to be confusing. The same commentator stated that progress is being made on opening public procurement to small and medium sized enterprises and Lord Young's reforms may have played a role in this.

⁴¹⁵ Sue Arrowsmith and Susie Smith, 'The 'Lord Young' Reforms on transparency of information and selection of firms to be invited to tender under the PCR 2015: A Practical Analysis of the Legal Provisions' (2018) 2 PPLR 2018.

⁴¹⁶ Jamie Thomas, *Public Procurement and Lord Young's Reforms – Two Years On* (2018) 27 PPLR Issue 4,

PART 2 : EMPIRICAL RESEARCH

Chapter 4 - Empirical research : methodology and approach

4.1 Introduction

I explained within Chapter 1 that the project is to consider whether or not the new EU rules within the Public Sector Directive 2014⁴¹⁷ (the Directive) which have been transposed into the Public Contracts Regulations 2015⁴¹⁸ (PCR 2015) have improved the public procurement process and how have they been perceived and applied in practice by those organisation who operate the rules in practice.

To ascertain how in practice the new rules have been considered and operated I followed a specifically designed empirical research methodology for the project involving semi-structured interviews with 27 participants from two categories of users of the public procurement rules in England and Wales. The two categories were procuring entities and public procurement consultants and legal advisers who carry out procurements on behalf of procuring entities and legal practices who advise on the public procurement procedure.

The collection of data through the semi-structured interviews was undertaken with key members of the various organisations who between them had either co-ordinated or been involved with over 1700 above threshold procurements, the specified amounts exclusive of Value Added Tax are contained in Article 4 of the Directive⁴¹⁹ and Regulation 5⁴²⁰ of PCR 2015.

Within this Chapter the methodological approaches which were adopted for the empirical research are covered and provides information on the selection of processes for undertaking the empirical research.

⁴¹⁷ Directive 2014/24/EU of the European Parliament and Council of the 25th February 2014 on public procurement and repealing Directive 2004/18/EC.

⁴¹⁸ Statutory Instrument 2015 No. 102 – Public Procurement

⁴¹⁹ Article 4 of the Public Sector Directive sets out the threshold limits for public works contracts, public supply and service contracts for central government and sub-central contracting authorities together with public service contracts for social and other specific services listed in Annex XIV to the Directive.

⁴²⁰ Regulation 5 of PCR 2015 refers to the amounts in Article 4 and the value in pounds sterling to be taken to the value determined by the Commission and published from time to time in the Official Journal in accordance with Article 6 of the Directive.

This Chapter is divided into several sections, these being:

Section 4.2 covers the design of the research and focuses on the approach to be taken and a strategy to be followed which supports the research design selected.

Section 4.3 focuses on the participants in the research, setting out the categories of the participants and the reasons for the selection of such participants.

Section 4.4 covers the method of the collection of data to be used in the research for this project.

Section 4.5 explains the design and content of the Interview Guide together with the main themes and other areas covered.

Section 4.6 covers the ethical issues and implications of the research being undertaken.

4.2 Design of the research

This section covers the design and approach taken in the research.

4.2.1 Design

The design of the research facilitates the structure of the project and also ensures that the information and data collected is consistent with the research objectives.⁴²¹ In considering the design I undertook a review of the focus of the research and selected an appropriate framework which would provide the answers to the research questions. I selected an empirical approach to the investigations to be undertaken on the basis that this approach would provide more detailed information on the rules being operated in practice. As the practical perspectives of practitioners on this subject are not currently available in literature, my research is therefore a major contribution. Empirical research of legal subjects is not purely doctrinal or theoretical as it does not just rely on the critical analysis of decided cases

⁴²¹ Peter Chisnell, *Marketing Research* (7th edn, McGraw-Hill Education, 2005)

and statute but studies the operation and the effects of the law⁴²² in practice and for this research the approach would therefore provide data on the law being applied in action. A valuable contribution to knowledge can be made by empirical research even though the findings are not representative or conclusive and may have to rely on further studies to provide a conclusive set of results.⁴²³ The empirical research approach goes beyond the views contained within textbooks on the law and is more reflective of everyday reality of the perspectives of those affected by the law.⁴²⁴

It has been said that any investigation undertaken where the empirical approach is being operated then qualitative methods can be employed to uncover and understand what lies behind a phenomenon to provide a novel and fresh perspective on an issue or to provide intricate detail on the phenomenon.⁴²⁵

As previously stated, the focus of the research relates to the perceptions and experiences of users in practice of the Directive and the Regulations in England and Wales. The empirical questions to be answered extend beyond any theoretical analysis of the rules. Opinions and facts will be sought from people who apply the legal rules as at present there is very little data currently available on how practitioners who undertake the procurement process view and operate the rules in practice. The approach to be taken must extend beyond a purely textual analysis of the rules but incorporate the meanings applied to and experienced by the people who use and operate the rules.

4.2.2 Adopted research approach

To answer the questions the appropriate empirical strategy has to be considered and I reviewed two empirical strategies which are used by researchers, namely the quantitative and qualitative methods.⁴²⁶ These methods reflect different epistemologies and forms of

⁴²² John Baldwin and Gwynn Davis, 'Empirical Research in Law' in P. Cane and M. Tushnet (eds) *Handbook of Legal Studies* (OUP 2005) 886.

⁴²³ Russell Korobkin, *Empirical Scholarship in Contract Law : Possibilities and Pitfalls* (University of Illinois Law Review [2002] 1033 UCLA).

⁴²⁴ John Baldwin and Gwynn Davis, 'Empirical Research in Law' in P. Cane and M. Tushnet (eds) *Handbook of Legal Studies* (OUP 2005) 886-887

⁴²⁵ Ansel Strauss and Juliet Corbin, *Basics of qualitative research : Techniques and procedures for developing grounded theory* (4th ed, Sage Publications 2014).

⁴²⁶ Alan Bryman, *Social Research Methods*, (5th ed, OUP, 2016).

representations.⁴²⁷ With a quantitative method, the researcher proposes a hypothesis about cause-effect relationships between variables then collects and analyses data producing findings that may lead to either the acceptance or rejection of the hypothesis.⁴²⁸ In this method the researcher usually knows in advance what is being looked for and can therefore design all aspects of the study before the data is collected.⁴²⁹ Although there are a number of limitations to this approach in that it can also potentially exclude contextual details and information,⁴³⁰ the approach can assist the researcher in remaining objectively separated from the subject matter, making the data more efficient in testing the hypothesis.

The qualitative approach involves detailed exploration of the issue, viewing a number of interactions from a variety of perspectives and is concerned with the meanings people attach to the phenomena and is usually associated with research which involves either a single case or a number of cases.⁴³¹ In the qualitative approach the researcher will emphasise meanings and experiences related to the phenomenon.⁴³² This approach examines ongoing processes, studying documentation and interviews with people who are either engaged in or are affected by the processes being studied.⁴³³ The structure of the design and the data is not organised in advance but develops as the empirical work proceeds.⁴³⁴ A wide range of tools can be used for the collection of the data including interviews, observations and documentary sources⁴³⁵ although the data used is generally in the form of words of the participants in the research which in turn are analysed to gain in depth information on the phenomenon which is under investigation. A robust qualitative research procedure will capture good data which will go to the core of the subject. A criticism of this methodology is that the research can be

⁴²⁷ Norman Denzin and Yvonna Lincoln, 'Introduction : The Discipline and Practice of Qualitative Research' in Denzin and Lincoln (eds), *The Sage Handbook of Qualitative Research* (3rd edn, Sage Publications 2005) 12.

⁴²⁸ Martyn Denscombe, *The Good Research Guide for small scale and social research* (OUP 2003) 12.

⁴²⁹ Keith Punch, *Introduction to Social Research : Quantitative and Qualitative Approaches* (2nd edn, Sage Publications 2005) 141

⁴³⁰ John Baldwin and Gwynn Davis, 'Empirical Research in Law' in P. Cane and M. Tushnet (eds) *Oxford Handbook of Legal Studies* (OUP, 2005).892.

⁴³¹ Gary King, Robert O'Keohane and Sidney Verba, *Designing Social Enquiry : Scientific Interface in Qualitative Research* (Preston University Press 1994) 4.

⁴³² Jill Collins and Roger Hushey, *Business Research* (Palgrave Macmillan 2003).

⁴³³ Susan Coutin, *Qualitative Research in Law and Social Science* 2012 p10 available at ResearchGate.net.

⁴³⁴ Keith Punch, *Introduction to Social Research : Quantitative and Qualitative Approaches* (2nd edn, Sage Publications 2005) 141

⁴³⁵ Norman Denzin and Yvonna Lincoln, 'Introduction : The Discipline and Practice of Qualitative Research' in Denzin and Lincoln (eds), *The Sage Handbook of Qualitative Research* (3rd edn, Sage Publications 2005) 12.

influenced by the underlying assumptions and the attitude of the researcher which could have implications on the findings being made more general.⁴³⁶

A project can adopt both the quantitative and the qualitative methods and for certain types of research projects a mixed methods approach could be useful.

The approach selected is dictated by a number of factors, more specifically the research question to be answered.⁴³⁷

As the research for this thesis is to understand the perspectives of users of the Directive and the Regulations on specific themes in the legislation then the qualitative methods is to be adopted as the purpose is to ‘extract’ from users their views and experiences of the rules in practice. The primary strength of qualitative research is its potential to explore a topic in depth.⁴³⁸

4.3 Participants in the research

4.3.1 Introduction

Having decided on the qualitative approach to ascertain answers to my research questions the participants to be recruited for the research to provide the data needed to be established.

Users of and practitioners in the operation of the public procurement process were to be considered and as there is no clear classification for those persons or entities I reviewed a range of people who are involved in the use and operation of the rules in practice and considered whether they could, for the purpose of the research, be included within three categories, these being policy makers, procuring entities and public procurement consultants including legal practitioners who are involved in the procurement procedure.

⁴³⁶ John Baldwin and Gwynn Davis, ‘Empirical Research in Law’ in P. Cane and M. Tushnet (eds) *Oxford Handbook of Legal Studies* (OUP, 2005).891.

⁴³⁷ Keith Punch, *Introduction to Social Research : Quantitative and Qualitative Approaches* (2nd edn, Sage Publications 2005) 141

⁴³⁸ Benedict Carlsen and Claire Glenton, *What about N? A methodical study of sample size reporting in focus group studies* (BMC Medical Research Methodology 11, 2011) 26

4.3.2 Sampling construction and procedures

Due to the vastness of those involved in the public procurement process it is necessary to construct a sample from the three categories previously stated. In view of the qualitative approach for the research it would be inappropriate, impractical and inefficient⁴³⁹ to approach every member of the public sector procurement population since the focus of empirical research is in-depth, detailed information rather than seeking a representative view of the information. In addition, there is not the time or the resources available to undertake such a task involving every member of the research population.

There are a range of potential difficulties in using the qualitative approach for research which involves the collection of information from a large number of subjects as this may also have an effect on the quality, depth and information gathered.⁴⁴⁰ In relation to the collection of information, there are also confidentiality / sensitive information concerns which may make certain individuals decline to participate in such widespread studies.

Where there are large numbers of subjects in the area of research a system of sampling and selection procedures must be considered and then adopted. The aim is to identify those who will be the most relevant to the objectives of the research and provide rich, dense and focused information to allow the researcher to provide a convincing account of the phenomenon.⁴⁴¹ The strategy to be adopted needs to be appropriate for the research and carefully selected to meet the requirements of the research.

There is a vast body of literature on sampling strategies⁴⁴² and there is a lack of consensus on the range of sampling strategies for qualitative research. Sampling in qualitative research is said to be a complex issue as there are many versions of qualitative sampling described in literature and some overlapping particularly in the case of purposeful and theoretical sampling.⁴⁴³

⁴³⁹ Martin Marshall, *Sampling for Qualitative Research. Family Practice* (Vol 13 No. 6 OUP 1996) 522.

⁴⁴⁰ Jennifer Mason, *Qualitative Research* (2nd edn, Sage Publishing 2002) 121.

⁴⁴¹ Michael Patton, *Qualitative research and evaluation methods* (3rd edn, Sage Publishing 2002) 230.

⁴⁴² Imelda Coyne, 'Sampling in Qualitative Research : Purposeful and theoretical sampling – merging or clear boundaries' (1997) 26 *Journal of Advanced Nursing* 623.

⁴⁴³ Janice Morse, 'Strategies for Sampling' in Janice Morse (ed) *Qualitative Nursing Research, A Contemporary Dialogue* (Sage 1991) 127 and Michael Patton, *Qualitative research and evaluation methods* (3rd edn, Sage Publishing 2002) 230. and Margarite Sandelowski, Theory and guises of theory in qualitative research, *Research in Nursing and Health* (Vol 16 Issue 3, John Wiley & Sons Inc. 1993) 213-218

In the literature on research methods one commentator⁴⁴⁴ provides a comprehensive discussion of a method of sampling, this being purposeful sampling and further cited that the logic and power of purposeful sampling lies in selecting information rich in cases for study in depth. Information rich cases it was said are those from which a great deal can be learnt about the issues of central importance to the purpose of the enquiry, thus the term purposeful sampling. The commentator further said that studying information rich cases yields insights and in-depth understanding rather than empirical generalisations. The same commentator suggested that there are sixteen strategies for purposeful sampling in qualitative research, each of which it was said service a different purpose but could be covered by the broad term of purposeful sampling. Although support is given to the view that all sampling strategies in qualitative research are purposeful, another commentator does not however agree with the sixteen strategies put forward and classifies purposeful sampling into three different strategies, these being theoretical variation, maximum variation and phenomenal variation.⁴⁴⁵

Yet another commentator⁴⁴⁶ suggests that there are three other different qualitative strategies in addition to purposeful sampling comprising nominated sampling, volunteer sampling and the sample comprising the whole population. Other sampling strategies are said to exist in qualitative research in addition to purposeful sampling and it is suggested that theoretical sampling is carried out on the basis of proven theoretical relevance to the evolving theory in the qualitative research⁴⁴⁷ and theoretical sampling shapes further data collection as conceptual ideas are developed rather than amassing general information.⁴⁴⁸

There are in literature clearly many variations and overlapping types of qualitative sampling especially in the areas of purposeful and theoretical sampling⁴⁴⁹ however in literature purposeful and theoretical sampling are viewed synonymously and are often interchanged.

⁴⁴⁴ Michael Patton, *Qualitative research and evaluation methods* (3rd edn, Sage Publishing 2002) 230.

⁴⁴⁵ Michael Patton and Margarite Sandelowski, *Theory unmasked : The uses and guises of theory in qualitative research, Research in Nursing and Health* (Vol 16 Issue 3 John Wiley & Sons Inc. 1993) p213-218

⁴⁴⁶ Janice Morse, 'Strategies for Sampling' in Janice Morse (ed) *Qualitative Nursing Research, A Contemporary Dialogue* (Sage 1991)127

⁴⁴⁷ Anselm Strauss and Juliet Corbin, *Basis of Qualitative Research Techniques and Procedures for Developing Grounded Theory* (2nd edn, Sage Publications 1998) 177.

⁴⁴⁸ Kathy Charmaz '“Discovering” chronic illness using Grounded Theory’ *Social Science & Medicine*.(1990) 30(11) Elsevier Ltd. 1161 and 1172.

⁴⁴⁹ Imelda Coyne, 'Sampling in Qualitative Research : Purposeful and theoretical sampling – merging or clear boundaries' (1997) 26 *Journal of Advanced Nursing* 623.

Commentators agree that sampling strategies used in qualitative research need not be mutually exclusive but if necessary a research project may combine more than one strategy.⁴⁵⁰ Most commentators appear to agree that qualitative research should be undertaken on the basis of some criteria rather than randomly as may be sometimes followed in the case of quantitative research.⁴⁵¹

I researched non-probability sampling methods as items for the sample are selected by the researcher instead of using techniques of random sampling. I considered a range of approaches to the operation of sampling methods and set out in Table 4.1 five sampling methods together with their advantages and disadvantages.⁴⁵²

<u>Sampling</u>	<u>Advantages</u>	<u>Disadvantages</u>
Purposeful (Purposive) sampling	A sample is built up which enables the researcher to satisfy their specific needs in a project. Planned selection of rich sources.	This method makes it prone to selection bias.
Snowball (referral sampling)	The researcher identifies one or more individuals from an interested area. After the participants have been interviewed, they are used as a basis to identify other members of the population and the methodology is then repeated.	Caution should be used in the adoption of this method. In addition, the method makes hard to reach or access participants and also runs a high risk of selection bias.
Convenience sampling	This method is inexpensive, relatively easy to operate and participants are generally available. This method is most widely used.	There is a high risk of under representation and it is not representative of the population. It is not known whether or not the findings are in fact representative. This method is the least satisfactory method of sampling.

⁴⁵⁰ Margarite Sandelowski, Theory and guises of theory in qualitative research, *Research in Nursing and Health* (1993) 16(3) John Wiley & Sons Inc. 213-218

⁴⁵¹ Jennifer Mason, *Qualitative Researching* (2nd edn, Sage Publications 2002) 121.

⁴⁵² Colin Robson and Kieran McCartan, *Real World Research: A Resource for Users of Social Research Method in Applied Settings* (4th edn, Wiley 2017) 280.

Quota sampling	Obtaining representatives of the various elements in relative proportions in which they occur in the population. This method can be relatively fast to undertake, easy to administer and low cost.	This method can result in an inaccurate presentation of the population due to selection bias. In addition, the gathering quota samples are subject of bias.
Dimensional sampling	This is an extension of quota sampling. The various dimensions are considered to be of importance in a survey often estimated by a pilot project.	This method can result in an inaccurate presentation of the population due to selection bias. In addition, the gathering quota samples are subject of bias.

Table 4.1 – Five sampling methods

I considered that purposeful sampling covered the planned selection of information rich sources to assist with understanding the phenomenon being researched and decisions are made prior to the commencement of the research. In comparison, theoretical research is where the sample is selected according to emerging theory and categories being developed, so the data controls further sampling which means the data analysis and sampling are carried out concurrently.⁴⁵³

In addition to the planned selection of rich information sources I further considered the novel nature of the research being undertaken I chose purposeful sampling. This would enable me to select participants to obtain in-depth information due to their ability to provide data on the range of themes under investigation. This strategy resulted in the selection of sixty-seven entities out of which twenty-seven were drawn from two categories and then participated in the research.

There are some further possible limitations or weaknesses of purposeful sampling, one limitation being that individuals are approached who can contribute to answering the research questions. Given the paucity of the perspectives of practitioners in the area of the research, purposeful sampling was an appropriate place to start the data collection.

⁴⁵³ Michael Patton, *Qualitative research and evaluation methods* (3rd edn, Sage Publishing 2002) 629.

4.3.3 Description of and information on categories and the recruitment of the participants

4.3.3.1 Introduction

This section provides information relating to the initial three categories from which research participants were sought and the process used to gain access to them. As only two final categories were used as stated in this section, participants were only drawn from these categories.

The basis of my analysis was founded on contracting authorities⁴⁵⁴ who operate the procurement rules. There are now two groups of contracting authorities, these being central and sub-central authorities. The differences between central and sub-central authorities is specifically provided for in Article 2 of the Directive.

4.3.3.2 Policy maker and central direct buying entity

Under my first category of purposeful sampling I investigated and selected the Crown Commercial Service (CCS) who bring together policy making and advice on procurement in the United Kingdom.

The CCS was originally created as the Buying Agency for the Government on the 1 April, 1991. On the 1 April, 2000 it became part of the now defunct Office of Government Commerce (OGC) within HM Treasury. In June, 2010 the CCS moved with its parent agency the OGC to become part of the Efficiency and Reform Group within the Cabinet Office. The name changed to the Government Procurement Services (GPS) and in January, 2014 the GPS merged with the procurement management from government departments to form the Crown Commercial Service.

In addition to covering policy and advice on public procurement the CCS also provides direct buying services to the public sector.⁴⁵⁵ The stated general intentions of the CCS are to make

⁴⁵⁴ Article 2 of the Directive 2014/24/EU and Regulation 2(1) of the Public Contracts Regulations 2015 defining contracting authorities.

⁴⁵⁵ Crown Commercial Service - About us available at www.gov.uk/government/organisations/crowncommercialservices/about and Sue Arrowsmith, *The Law of*

savings for customers in both central government and the wider public sector, achieve maximum value for money and improve the quality of service delivery for common goods and services across government bodies.

In respect of procurement policy and advice the CCS carries out its functions by the publication and issue of guidance and information on procurement rules under both the Directive⁴⁵⁶ and PCR 2015⁴⁵⁷ and practice to the public sector and how to apply the rules through Procurement Policy Notes. The CCS also develops procurements through workshops and training materials on procurement and commercial skills for civil servants and other public sector professionals.⁴⁵⁸

In addition to their advice and guidance roles the CCS have as a government authority procured several Framework Agreements under the Directive as transposed into the Public Contracts Regulations and then managed and ran a range of Framework Agreements for goods, services and works. Accordingly, in this role the CCS could be classified as a 'procuring entity' which is another separate classification in my research.

4.3.3.3 Recruitment of participants under this classification

I identified a key person in the CCS who is responsible for both public procurement and the provision of advice and sent an email to them inviting them to participate in the research or to pass my invitation to another person in the CCS to participate. As I did not receive a reply, I again contacted the individual who confirmed that my invitation had been passed to another member of the CCS. Having received no response, I contacted two other individuals who are involved in advising the procurement side of the CCS and then sent them invitations to participate. I subsequently spoke to them on the telephone to pursue the invitations and whilst they did not formally respond they stated they would attempt to provide someone who could assist in my research. I did not hear further from either person and subsequently closed

Public and Utilities Procurement Regulation in the UK and EU (3rd edn, Vol 1 Thompson Reuter 2014) 14 & 15.

⁴⁵⁶ Crown Commercial Service, Brief Guide to the new EU Public Contracts Directive (2014).

⁴⁵⁷ Crown Commercial Service, Guidance in awarding Contracts under the Public Contracts Regulations 2015 (2016).

⁴⁵⁸ Crown Commercial Service, Commercial and Procurement Training – available at www.gov.uk/guidance/commercialandprocurementtraining

this classification of participant. The absence of the CCS as a participant I consider does not affect my research.

4.3.3.4 Procuring entities

Introduction

This category involves a range of entities who undertake public procurement under the Directive⁴⁵⁹ and the PCR 2015.⁴⁶⁰

Review of entities

Based on my review of the rules and my experience in public procurement I considered the various classifications and categories of the various entities:-

- Central Government Authorities and their Agencies.⁴⁶¹
- Local Authorities⁴⁶² which can be divided into sub-classifications such as Metropolitan Districts, London Boroughs, Unitary Authorities and Unitary Councils, County Councils, Borough and District Councils.
- Central Purchasing Bodies.⁴⁶³ In the UK Central Purchasing Bodies are major procuring entities of Framework Agreements and more recently Direct Purchasing Systems in the public sector.
- Other entities which are governed by Public Law⁴⁶⁴ which includes the classification of Housing Associations.⁴⁶⁵

⁴⁵⁹ Authorities are defined in Article 2 of the Directive 2014/24/EU.

⁴⁶⁰ Authorities are defined in Public Contracts Regulations 2015.

⁴⁶¹ Central Government Authorities means the Crown and all the bodies listed in Schedule 1 to the Public Contracts Regulations 2015 and further as defined in Regulation 2(1) of the Public Contracts Regulations 2015.

⁴⁶² Local Government Association A-Z of Councils available at www.local.gov.uk/our-upport/guidance-and-resources

⁴⁶³ As defined in Article 37 of the Directive 2014/24/EU and Regulation 37 of the Public Contracts Regulations 2015.

⁴⁶⁴ Bodies governed by public law as defined by Article 2(4) of Directive 2014/24/EU and Regulation 2(1) of the Public Contracts Regulations 2015 and Sue Arrowsmith, *The Law of Public and Utilities Procurement – Regulation in the UK and EU* (3rd edn Vol 1 Thompson Reuter 2014) 346-348.

⁴⁶⁵ A Housing Association is a not-for-profit organisation which owns, lets and manages rental accommodation and can also be referred to as ‘registered social landlords’. The status of entities responsible for providing social housing and covered as a body governed by public law. See Case C-237-99 Commission v France [2001] E.C.R. I-00939 CJ.

In December, 2018 there were within England, Wales and Northern Ireland some 695 entities which fell within the four categories listed above and I refer to the number in each individual category later in this section. Based on the vast number of entities it would have been impossible and unnecessary to interview all the entities in this category.

An analysis using a purposeful sampling approach was considered to provide a broad spectrum and range of participants to be interviewed. This would in turn ensure that detailed and rich information could be gathered. The results of the findings under this classification of participants are contained within Chapter 5.

Recruitment of participants

I considered each sub-group listed in the review of the procuring entities previously shown above.

Central Government Authorities and their Agencies

I initially viewed the list of Central Government Authorities contained within Schedule 1 to the PCR 2015 but then visited the government's website⁴⁶⁶ to obtain a more recent list.

To recruit participants for my research in this sub-group I visited various websites of entities to search for contact details of officers I could invite to participate. This process failed to produce the information I required so I then searched Contract Notices published in the Supplement to the Official Journal of the European Union (OJEU)⁴⁶⁷ for the contact information. I found five procurements by Central Government Bodies in Contract Notices on Tenders Electronic Daily. I selected several the contracting authorities under this sub-group for my research and found that except for one authority there were no direct contact names provided. All the other contact references were directed to a specific e-portal, commercial email address or the Crown Commercial Service as agents of the authority, all the references being linked to the procurement in question. I did however contact two of the

⁴⁶⁶ Departments, agencies and public bodies available at www.gov.uk/government/organisations

⁴⁶⁷ Tenders Electronic Daily (TED) – public procurement notices available at www.ted.europa.eu/

email addresses for information but did not receive a response. In respect of the one contact name I had found from the Contract Notices I sent them an Invitation but not receiving a response I telephoned the authority and was informed that the person had left the organisation and they were in the process of recruiting for the position. After explaining my requirements, I enquired whether there was another person who I could invite to participate but was told there was no person available at this time. I accordingly closed this sub-category of procuring entities. I consider the absence of any participants from this sub-category does not affect my research.

Local Authorities

There are some 394 local authorities⁴⁶⁸ in England and Wales.⁴⁶⁹ The vast number of authorities in this sub-group made it impractical and unnecessary to contact every one of the members. I therefore applied purposeful sampling to identify those subjects which could offer full information on the application of the rules and who could comment on the rules in use for procurements in which they were involved.

I initially considered the lists of local authorities published by the Local Government Association and then searched Contract Notices published in the Supplement to the Official Journal of the European Union (OJEU)⁴⁷⁰ for details of recent procurements and the contact information I required for my research. I also considered the web-based portal where contracting authorities must ensure that procurement opportunities and contract awards are published which is known as ‘Contracts Finder’ in compliance with the Public Contracts Regulations.⁴⁷¹

Based on the information I obtained I sent invitation emails to 15 local authorities. Whilst the overall response was disappointing, 3 however agreed to participate in the research and were subsequently interviewed. Difficulties in participant recruitment for qualitative research

⁴⁶⁸ A local authority is defined in The Local Authorities Act 1992 at paragraph 270(1) and generally in Stephen Cirell and John Bennett, *Charging and Trading in Local Government* 2003 Sweet & Maxwell.

⁴⁶⁹ Local Government Association A-Z of Councils available at www.local.gov.uk/our-support/guidance-and-resources

⁴⁷⁰ Tenders Electronic Daily (TED) – public procurement notices available at www.ted.europa.eu/

⁴⁷¹ Part 4 of the Public Contracts Regulations 2015 – Regulations 106 and 110.

has been recognised as being challenging and a resource intensive aspect of a study.⁴⁷² Problems with accessing participants and then their recruitment is reported by qualitative researchers.⁴⁷³ To ensure participation from this sub-group of local authorities I again contacted a number of those who I had previously invited some weeks before. One of my follow up invitations agreed to participate and another person offered to put me in contact with the Local Government Association so that I could generate an alternative method of invitation. With that person's assistance I approached the Local Government Association and they included in their March, 2019 edition of the Local Government News and Updates newsletter⁴⁷⁴ a condensed version of my invitation. As a result of the newsletter four expressions of interest were received and they were sent Invitations to Participate by email at the end of April, 2019. Three of those invited returned the acceptance and were subsequently interviewed.

6 participants under this sub-group were interviewed during April and May, 2019 and the results of the findings under this classification of participant are contained in Chapter 5.

Central Purchasing Bodies

As a practitioner in public procurement I have noticed that Central Purchasing Bodies have been providing a greater role in procurement with contracting authorities using such Bodies to undertake the procurement and to conclude the Contracts on their behalf.⁴⁷⁵ Central Purchasing Bodies are major procuring entities of Framework Agreements and more recently Direct Purchasing Systems. Article 1(10) of the Directive⁴⁷⁶ and Regulation 2(1) of the PCR 2015 define a Central Purchasing Body as a contracting authority and is further said to mean a contracting authority which provides centralised purchasing activities and provide ancillary purchasing activities.

⁴⁷² Mandy Archibald and Sarah Munce, 'Challenges and Strategies in the Recruitment of Participants for Qualitative Research'. (2015) 11 University of Alberta Science Journal 34-37.

⁴⁷³ Alan Bryman, *Research Methods and Organisation Studies* (Routledge 1992) 161.

⁴⁷⁴ Local Government Association NAG and SOPO members only monthly newsletter, March 2019 sent to all local authority procurement officers.

⁴⁷⁵ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* Vol 1, Third Edition, Sweet & Maxwell P373.

⁴⁷⁶ Central Purchasing Bodies are also referred to in Recitals 69 and 70 to the Directive 2014/18/EC.

I initially researched literature available on Central Purchasing Bodies to obtain details of the Bodies which were registered so I could review their websites and contact those responsible for the procurement process. I found that the literature in the main did not contain current information, an example of this being an Annual Review prepared by the Homes & Communities Agency.⁴⁷⁷ One current source⁴⁷⁸ however only covered twenty-five organisations and these were designated as ‘Professional buying organisations’. When considering both sources there was no specific person listed that I could contact.

I then searched the Contract Notices published within the Supplement to the Official Journal of the European Union (OJEU)⁴⁷⁹ for details of recent procurements and the contact information I required. In addition, I also viewed Contracts Finder⁴⁸⁰ as previously described. I found several people responsible for the procurements being carried out by a Central Purchasing Body. I sent invitation emails to the 9 people named and 5 agreed to participate in the research and were interviewed during April and May, 2019. The results of the findings under this classification of participants are contained within Chapter 5.

Other entities which are governed by public law including Housing Associations

I initially searched literature available relating to Housing Associations. The total listed of these organisations was 1656.⁴⁸¹ Because of the vast number of organisations in this sub-group I applied purposeful sampling to identify those organisations which could offer full information on the application of the rules and comment on the rules in use for procurements in which they had been involved. In this regard I considered further literature on Housing Associations. One document entitled ‘Top 200 Social Housing Providers revealed’⁴⁸² whilst very useful had been prepared in 2011. I then considered a Report entitled ‘Annual Review of Social Housing’⁴⁸³ which listed the 100 largest Registered Providers including Housing Associations and Private Social Landlords. I reviewed the details of the top Housing Associations in 2017 and noted these organisations.

⁴⁷⁷ Homes & Communities Agency, Annual Review – Procurement Efficiency Initiative 2013-2014.

⁴⁷⁸ Public Authorities listed as ‘Professional Buying Organisations’ available at www.whatdotheyknow.com

⁴⁷⁹ Tenders Electronic Daily (TED) – public procurement notices available at www.ted.europa.eu/

⁴⁸⁰ Part 4 of the Public Contracts Regulations 2015 – Regulations 106 and 110.

⁴⁸¹ List of registered providers of social housing available at www.gov.uk/government/publications/current-registered-providers-of-social-housing

⁴⁸² The Tenant Services Authority (TSA), Top 200 Social Housing Providers – 24 Housing, August 2011.

⁴⁸³ 2017 Annual Review of Social Housing; Beever and Struthers, Chartered Accountants.

Although I had obtained information on a range of Housing Associations, I also searched Contract Notices published within the Supplement to the Official Journal of the European Union (OJEU)⁴⁸⁴ for details of recent procurements and contact information for my research. In addition, I also considered the web-based portal ‘Contracts Finder’⁴⁸⁵ as previously described. Having found details of 18 individuals who were responsible for the procurement included in the Contract Notices I invited them to participate in the research by email. I subsequently received responses from 3 participants in this sub-group and these individuals were interviewed during April and May 2019. The results of the findings under this classification of participants are contained within Chapter 5.

In addition, I sent email invitations to 3 people responsible for procurement at the Universities where they are employed. I did not receive any response to my invitations to participate in the research. The Universities selected I had ascertained from my investigation were contracting authorities.

4.3.3.5 Procurement Consultants and Legal Advisers

When researching the Contract Notices listed in the Official Journal of the European Union (OJEU) for details of recent procurements and contact information for the sub-groups within the other classification I noted that many of the procurements were being undertaken by Procurement Consultants or legal organisations, acting as Agents on behalf of the Contracting Authority listed on the Contract Notice for the procurement. I obtained details of 18 organisations and sent invitations by email to the person or organisation to participate. I received 13 responses including from one legal adviser who required the named person to be replaced by another which I agreed to as this transfer was provided for in my Invitation to Participate document. These participants were interviewed during April, May and June, 2019. The results of the findings under this classification of participants are contained within Chapter 5.

⁴⁸⁴ Tenders Electronic Daily (TED) – public procurement notices available at www.ted.europa.eu/

⁴⁸⁵ Part 4 of the Public Contracts Regulations 2015 – Regulations 106 and 110.

Category	Invited	Participated	Method of Interview
Policy Maker	1	Nil	N/A
Procuring Entities comprising Central Government Departments, Local Authorities, Central Purchasing Bodies and other entities	48	14	3 Face to face interviews 11 telephone interviews
Consultants and Legal Advisers	18	13	2 Face to face interviews 11 telephone interviews
Totals	67	27	

Table 4.2 indicating summary of participants invited and subsequently included in my research

4.4 Methods of Data Collection

Qualitative research to collect the information required can be undertaken using a variety of tools and techniques including participant observations, documentary and conversational analysis and interviews.⁴⁸⁶ Researchers often combine several of these techniques in a single project. When making the decision as to the appropriate tool to use to collect the information required for investigations, the subject matter of the research must be considered to obtain the type of information required within the time frame and the resources available for the research in question.

Having considered the research question and the objectives required to be met for the research and after receiving full ethical approval I decided to use interviews as the most appropriate data collection technique to obtain rich and detailed information. I did not consider that a Questionnaire would assist me in gathering the rich data I was seeking from practitioners as they take some time to complete by a participant especially those undertaking further procurements and also self completed Questionnaires would mean that I could lose control of the data to be provided.

⁴⁸⁶ Hubert Rubin and Irene Rubin, *Qualitative interviewing, the art of hearing data* (3rd edn, Sage Publishing 2011) 26.

The qualitative research interview has been defined as the gathering of the life-world of the interviewee with respect to interpretation of the meaning of the described phenomena.⁴⁸⁷ The interview technique enables interviewees to describe in their own words issues that are meaningful to the research and the researcher can probe for detail which in turn permits the participants to contribute their knowledge and experience. This is particularly important for the present project because of the issues being examined in the research.

It has been said that an interview is a purposeful discussion between two or more people.⁴⁸⁸ In relation to qualitative interviews there are many types and styles of interviewing which are categorised in literature with the common distinction being made based on the degree of structure or standardisation of the interview.⁴⁸⁹ Interviews are predominately categorised as being structured or standardised interviews, semi-structured, unstructured or non-standardised interviews.⁴⁹⁰ Another commentator said that the three way classification of structured, semi-structured and unstructured interviews apply to individual and group interviews.⁴⁹¹

The structured interview has pre-determined questions with fixed wording usually in a pre-set order or arrangement. There is no flexibility, but the format has the benefit of reducing any bias on the part of the interviewer. The main disadvantage is that the interview has little flexibility and may have an impact on participation of the interviewee with little room for response. The purpose of structured interviews in the main is to collect qualitative data.

In the semi-structured interview format, the interviewer has an outline of the topics or issues but can vary the wording. The interviewer can also adopt an interview guide that also serves as a checklist of the topics to be covered at the interview. The wording and order can also be modified based on the flow of the interview and following the semi-structured approach it provides for probing the views of the interviewees and permits them to expand their responses. Additional unplanned questions can be asked to follow up what the interviewee

⁴⁸⁷ Steinar Kvale; 'The Qualitative Research Interview. A phenomenological and hermeneutical mode of understanding' (1983) 14(1-2) *Journal of Phenomenological Psychology*. 171-196.

⁴⁸⁸ Mark Saunders, Philip Lewis and Adrian Thornhill, *Research Methods for Business Students* (5th edn, Financial Times/Prentice Hall 2007) 320.

⁴⁸⁹ Colin Robson and Kieran McCartan; *Real World Research : A Resource for Users of Social Research Methods in Applied Settings* (4th edn, John Wiley & Sons Ltd. 2016) 285.

⁴⁹⁰ Nigel Mathers, Nick Fox and Amanda Hunn, *Trent Focus for Research and Development in Primary Health Care : Using Interviews in a Research Project* (Trent Focus 1998) 2.

⁴⁹¹ Andria Fontana and James Trey; 'Interviewing : The art of science' in N.K. Denzin and Y.S. Lincoln (eds) *Handbook of Qualitative Research* (Sage Publishing 1994) 361-376.

has said. Well planned and considered semi-structured interviews are the result of rigorous preparation and requires at all stages of the interview including the analysis of the data careful consideration and preparation.⁴⁹²

The third interview type is the unstructured interview also referred to as in depth interviewing which is predominately used to explore general areas as phenomena in which the interviewer is interested. There are no predetermined questions and the interviewee is offered the opportunity to talk freely about events and decisions in context. This type of interview has been referred to as an informant interview.⁴⁹³ The main role of the interviewer in this type of interview is to rephrase responses so they can be understood and to try and understand the informants views and so the relationship between the interviewer and the informant is important. Due to its format the analysis of the collected data is time consuming as the data is often difficult to analyse.⁴⁹⁴

Having considered the aims and objectives of the research for the project I decided to adopt a semi-structured interview technique. In arriving at my decision, I also considered that the structured interview approach would restrict the participants from expressing their views and would not allow me to obtain the experiences of the participants which I required for my research. I further considered unstructured interviews which due to the focus of my research would not be appropriate and could involve participants putting forward or expressing other issues which, whilst interesting, would move away from the aims of the research and expend time and resources to review.

Interviews

Interviews can be carried out with participants in several ways such as face to face, telephone interviews, computer assisted formats such as Skype and Facetime and internet-based interviewing.⁴⁹⁵

⁴⁹² Colin Robson, *Real World Research : A Resource for Social Scientists and Practitioner Researches* (2nd edn, Blackwell Publishers 2016).

⁴⁹³ Nigel Mathers, Nick Fox and Amanda Hunn, *Trent Focus for Research and Development in Primary Health Care : Using Interviews in a Research Project* (Trent Focus 1998) 3.

⁴⁹⁴ Colin Robson and Kieran McCartan; *Real World Research : A Resource for Users of Social Research Methods in Applied Settings* (4th edn, John Wiley & Sons Ltd. 2016) 295-298.

⁴⁹⁵ Kallio, H, Pietila, A, Johnson, M and Kangasniemi, M 2016, 'Systematic methodological review : developing a framework for a qualitative semi-structured interview guide', *Journal Of Advanced Nursing*, **72** (12) ,

Data was collected for the project through face to face interviews where possible but due to the location throughout the country of many the participants and their workload, I offered them telephone interviews. By offering participants the combination of face to face and telephone interviews this enabled me to obtain a range and a greater number of participants for my research.

As previously stated, 27 participants took part in the research. The 5 face to face interviews were all held at the offices of the organisations where the participants are employed. The remaining 22 interviews were undertaken over the telephone.

In following the semi-structured interview approach, I had to decide on the relevant type and structure of the questions to be asked of the participants. Having identified in Chapter 3 a number of themes which would form the basis of my research I considered a framework for a qualitative semi-structured Interview Guide. Rigorous development of the qualitative semi-structured Interview Guide would contribute to the objectivity and trustworthiness of studies and make the results more plausible.⁴⁹⁶ I then prepared an Interview Guide and I set out in the next section the design of the questions to be asked at the Interviews. The questions in the Interview Guide were designed to achieve the richest possible data for the research.⁴⁹⁷

Qualitative research where undertaken typically involves the collection of a large amount of data and so I set in place a system to ensure the proper collection and management of the data.

Interviews of all the participants were recorded using a digital voice recorder and I also took notes during each interview. The transcripts of the interviews and my notes on each of the responses to the questions in the Interview Guide were then scheduled for analysis. The schedule was structured to cover not only each of the participants but the two categories of participants, these being procuring entities and consultants including legal advisers.

⁴⁹⁶ David Turner; *Qualitative Interview Design : A practical guide for the novice researcher*. The Qualitative Report 15(3) 2010 p754-760 available at <https://insuworks.nova.edu/tqr/vol15/iss3/19/>

⁴⁹⁷ Steinar Kvale; *An introduction to Qualitative Research Interviews* (Sage Publications 1996) 129-131.

In undertaking the interviews I followed a structured process and drew to the attention of each of the participants the content of the Participant Information Sheet which had been sent to them by email in advance of the interview for them to consider and which set out a brief summary and the purpose of the research together with information on their participation and the confidentiality of their participation which included confirmation that there would be no direct reference to either their name or that of their organisation in the study.

4.5 The Interview Guide

As explained in the last section an Interview Guide was used when undertaking the semi-structured interviews with the participants. The Interview Guide contained the questions to be asked and addressed by participants. The questions were aimed to extract rich information and data from the participants relating to their various experiences in use and understanding in practice of the procurement rules in the new Public Procurement Directive⁴⁹⁸ which has been modernised with the objective of the public procurement regime of simplification and flexibilisation of the regime.⁴⁹⁹ The questions relate to four themes, details of which are set out in Chapter 3 and cover Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders.

Apart from listing all the questions, the Interview Guide acts as an agenda which ensures all the themes and other related questions are systematically covered during the interview which in turn can act as an unobtrusive roadmap. This assists in maintaining consistency in the interview process but still allows flexibility to pursue any detail which may be relevant to an individual participant. A good Interview Guide can also provide the research with prompts as well.

The design of the Interview Guide is a key element of qualitative research and the structure and whether a number of Interview Guides should be used in the study. I prepared information on the four main themes and then drafted an initial set of questions which I then turned into an Interview Guide. I found that where the questions I had prepared were too extensive this could have prevented me from obtaining the data I was seeking. Further

⁴⁹⁸ Directive 2014/24/EU of the 26 February 2014.

⁴⁹⁹ COM (2011) 896 final, 2011/0438 (COD) Proposed Procurement Directive. Explanatory Memorandum section 1.

review indicated that there was duplication in the questions, albeit each question was drafted with different wording. In considering the construction of the questions I endeavoured to make the questions easy to understand as well as clear and concise for the participant without any ambiguities.⁵⁰⁰ The questions were drafted to obtain the experiences of the participants in practice and their understanding of the rules. After further review I prepared a final Interview Guide, a copy of which is attached as Appendix 2 to this thesis.

The Interview Guide covers the four main themes and to make the research more substantial and rounded I also included a general section which covered other related issues to the research questions. For completeness of the research on the four themes I included a further question which sought from the participants an overall view and assessment of all four of the topics and whether in their experience the rules had been made more flexible and modernised. This concluding section was used to obtain final comments from the participants on the four themes and to close the interviews.

To test the robustness of the Interview Guide I carried out four pilot interviews with two Procuring Entities and two Procurement Consultants and as a result of these interviews I made some minor adjustments which did not affect the themes in the Guide but assisted in the consideration of the responses.

The Interview Guide comprised of the following sections.

(1) Section A – General Questions

This first section sought to gather background information on the participant's experience in practice by the number of procurements in which they had been involved since the introduction of the new rules. This section also explored the views of participants on whether they considered that in practice the introduction of the new rules had simplified the procurement process and made the use of the rules more flexible. The final question in this section related to the training or retraining which had resulted through the introduction of the new rules. The data from the responses to these Questions will assist in my overall analysis

⁵⁰⁰ Richard Kruger and Mary Anne Casey; Focus Group, A Practical Guide for Applied Research (3rd edn, Sage Publications 2000) 41-42.

in my research. In addition, this question resulted from a need in relation to public procurement for an improvement in skills and lack of expertise which had been highlighted in the public sector.⁵⁰¹

(2) Section B – Selection Criteria

This section of the Interview Guide is to explore the participant's experience in practice in respect of the selection and operation of Selection Criteria. This section covers the selection or eligibility criteria which are an essential part of the competitive procurement procedure as this allows for basic consideration concerning the suitability of an economic operator⁵⁰² to be separated from the review of its economic (pricing/commercial) and technical offer.⁵⁰³

The first issue to be examined is that of the list of possible Selection Criteria which is still exhaustive under the new rules. In view of this large number of Selection Criteria the Crown Commercial Service attempted to facilitate easy access to procurements from suppliers and following the replacement of the statutory Pre-Qualification Questionnaire (PQQ) prepared a Standard Selection Questionnaire (SQ).⁵⁰⁴ This Selection Questionnaire incorporated all the exclusion grounds listed in Regulation 57 of the PCR 2015 and Article 57 of Directive 2014/24/EU to align with those listed in the European Single Procurement Document (ESPD).⁵⁰⁵ Although the Selection Questionnaire is used there is an alternative which the CCS permit for certain procurements which is the Publicly Available Specification (PAS91)⁵⁰⁶ which is a pre-qualification questionnaire which was again developed to reduce the need for suppliers to complete a number of different documents and which has now been updated as a selection questionnaire for works contracts.

⁵⁰¹ Joshua Pritchard and Rose Lasko-Skinner, *Please Procure Responsibly. The state of public service commissioning* (Reform Research Trust 2019) 32-34.

⁵⁰² Economic operator as defined in Article 2(10) of the Directive 2014/24/EU and Regulation 2(1) of the Public Contracts Regulations 2015.

⁵⁰³ Abbey Semple, *A Practical Guide to Public Procurement* (OUP 2015) 98.

⁵⁰⁴ Crown Commercial Service, Procurement Policy Note : Standard Selection Questionnaire Action Note 8/16. 9th September 2016.

⁵⁰⁵ European Single Procurement Document (ESPD) is a self declaration form used in procurement procedures across the EU that companies can use to declare that they fulfil the exclusion and selection criteria of a tender. Article 59 of the Directive 2014/18/EC and Regulation 59 of the Public Contracts Regulations 2015.

⁵⁰⁶ Publicly Available Specification (PAS91) 2017+A1 published by the British Standards Institution.

This section also examines participants on several specific changes to the rules on selection criteria covering financial and economic criteria, technical and professional ability and conflicts of interest which all must be taken into consideration by contracting authorities.

The final element covers changes in evaluation methodology adopted under the new rules at the selection stage.

(3) Section C – Contract Award Criteria

The correct selection and then the application of contract award criteria will determine with whom a contracting authority will contract for goods, services and works. The importance of this area of the public procurement must merit an extensive commitment of time and a review process which should be operated by well trained and skilled personnel. The selection of how the award criteria is devised by the contracting authority together with the methods of weighting and scoring and then the evaluation of the contract award criteria is therefore fundamental to the procurement being undertaken. The award criteria are therefore one of the areas most commonly scrutinised when tenderers review the procurement documents at Tender Stage.

As the new rules state that a contract must be awarded on the basis of the Most Economically Advantageous Tender (MEAT) only, the first questions focuses on the participant's understanding of the new rules and their experiences in relation to MEAT and how, in practice, they select and assess the contract award criteria.

The later questions cover how the participants in practice identify the basis of best price or cost only and apply a cost-effective approach and if their approach has changed as a result of the new rules. Cost in the new rules in Article 67 of Directive 2014/24/EU and Regulation 67 of the PCR 2015 links to life cycle costing which is confirmed by the Crown Commercial Service.⁵⁰⁷ Participants will be interviewed on their experience in practice of the use of life cycle costing as part of the assessment.

⁵⁰⁷ Crown Commercial Service, The Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 – Guidance on Awarding Contracts : An Overview of Key Points and Frequently Asked Questions. p6 October 2016.

(4) Section D – Framework Agreements

The Directive it is said now aims at improving the system of Framework Agreements⁵⁰⁸ and includes changes and clarifications to the provisions for Framework Agreement rules, with other new rules, the longevity of Framework Agreements together with the availability of two procurement methods under a Framework Agreement and new rules relating to multi-provider Frameworks with direct award procedures.⁵⁰⁹ Framework Agreements are also covered in Recitals 60 to 62 of the Directive. In Recital 60 it is stated that the instrument of Framework Agreements has been widely used and are considered an efficient procurement technique.

In the first questions participants will be interviewed on the types of Framework Agreements they are now procuring and concluding under the new rules. Participants will be asked if under the new rules they now find one type of Framework Agreement, either single provider / supplier or multiple provider / supplier, more appropriate for a particular type of contract and whether the new rules with the changes to Framework Agreements have changed their choice of Framework Agreement.

The following questions explore multiple provider / supplier Framework Agreements and participants will be asked about the method they now operate under the new rules for selecting providers / suppliers and placing specific contracts and what types of objective criteria is used for the subsequent call-off from the Framework Agreement as the Directive introduced important clarifications on call-offs.⁵¹⁰ Participants will be asked how in practice they now notify providers / suppliers on a Framework the results of Call-offs either direct award without reopening competition or mini-competition.

In the final questions participants will be interviewed on the type of award procedure such as open, restricted or another procedure under which they conduct the procurement of

⁵⁰⁸ Francois Lichere, Roberto Caranta and Steen Treumer (Eds) *Modernising Public Procurement : The New Directive* (DJØF Publishing 2014) 214

⁵⁰⁹ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of EU Public Procurement Rules* (Edward Elgar Publishing Ltd. 2016) 222

⁵¹⁰ Marta Andrecka, 'Framework Agreements EU procurement law and practice' (2015) No. 2 Procurement Law Journal 132.

Framework Agreements and further have they changed their selection of procedure under the new rules.

(5) Section E – Abnormally Low Tenders

With EU public procurement the concept of abnormally low tenders has long been recognised as having a significant role, however there is no definition or example of what might be considered by a contracting authority as an abnormally low tender. It has been said that the provisions on abnormally low tenders have undergone significant changes in the Directive and these changes have been described as a revitalisation of the provisions.⁵¹¹ The Directive and the PCR 2015 set out some processes required of the Tenderer by a contracting authority.⁵¹²

In the first questions participants will be interviewed on whether the changes in the rules on abnormally low tenders have made their obligations and the actions to be taken more clear and also how their organisations make clear reference in the procurement documents to the actions that will be taken in relation to abnormally low tenders and their experience of operating the procedures where abnormally low tenders have been found.

The following questions explore the processes for investigation of abnormally low tenders and whether they have clear audit trails and procedures to meet the obligations set out in Regulation 84(1)(c) of the PCR 2015 which relate to reporting and documentation requirements in respect of abnormally low tenders.

(6) Section F – Concluding Question

The concluding question provides an opportunity for participants to provide an overall assessment of all the four themes and to add any other relevant comment relating to the points covered in Sections B to E inclusive. This question allowed me to clarify any information provided by the participants in their responses.

⁵¹¹ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of EU Public Procurement Rules* (Edward Elgar Publishing Ltd. 2016) 146

⁵¹² Article 69 of the Directive together with Recital 103 of the Directive and Regulation 69 in the Public Contracts Regulations 2015.

4.6 Ethical Issues

I identified the ethical issues raised by this research so action which could be taken to either minimise or remove the risks of the research and to take the appropriate course of mitigation. The issues in the present research I identified as having only minimal risk, this being in relation to information which participants may consider as being confidential regarding the presentation of the data provided by and collected from participants.

I accordingly submitted a formal Ethical Approval Request to the University and subsequently received the necessary approval from the Ethics Department.

In advance of the date set for each interview I followed the procedures required by the University and sent to each of the participants a copy of the Participant Consent Form and a Participation Information Sheet. At the commencement of each interview participants were drawn to the content of the Participant Information Sheet and the Consent Form and I confirmed the purpose of the research, how information and data would be used in the research and before starting the digital recording device I obtained permission to record the interview. I reminded participants that whilst there was no commercially sensitive information required, they could withdraw from the interview at any time. In addition, I informed participants that they could ask questions during the interview and could refrain from answering any of the questions. At the end of the interview I informed participants that they could, if required, receive a copy of the transcript of the interview and that I am using references known only to me to identify the transcripts of individual interviewees. I confirmed that I would ensure safe custody of all data and materials collected during each interview.

Chapter 5 : Analysis of Data and Empirical Findings

5.1 Introduction

This chapter presents the empirical findings on the perceptions of participants together with their experiences in the practice of undertaking public procurement and whether the new EU rules within Directive 2014/24/EU⁵¹³ (the Directive) which have been transposed into the Public Contracts Regulations 2015⁵¹⁴ (PCR 2015) have improved the public procurement process.

Section 5.2 of this Chapter contains the responses of the participants and the analysis of their comments on the four themes selected as detailed in section 3.2 of Chapter 3 and other issues explored via Sections A to F of the Interview Guide⁵¹⁵ which is organised as follows:

- 5.2.1 A General questions on related issues to the research.
- 5.2.2 B Selection Criteria
- 5.2.3 C Contract Award Criteria
- 5.2.4 D Framework Agreements
- 5.2.5 E Abnormally Low Tenders
- 5.2.6 F Conclusion question on the four themes in Sections B to E inclusive.

Information on Sections A to F of the Interview Guide is set out in section 4.5 of Chapter 4.

Before the responses and comments are presented it is important to refer to the processes involved in the analysis of the data as this is pertinent to the proper understanding of the context within which the data analysis was carried out. As explained in Chapter 4 the main source of data for the research was semi-structured interviews with 27 participants which I finally divided into two categories.⁵¹⁶ The first category was Procuring Entities and comprised of 14 Procuring Entities (Local Authorities, Central Purchasing Bodies and other entities governed by public law including Housing Associations). The second category of 13

⁵¹³ Directive 2014/24/EU of the European Parliament and Council of the 25th February 2014 on public procurement and repealing Directive 2004/18/EC

⁵¹⁴ Statutory Instrument 2015 No. 102 – Public Procurement

⁵¹⁵ A copy is attached as Appendix 2 to this thesis.

⁵¹⁶ For the background to the categories see Chapter 4.

participants comprised of Consultants and Legal Advisers, 9 of which in this category were Consultants who undertake and manage public procurement for works, services or supplies contracts for their contracting authority clients. The remaining 4 participants were Legal Advisers concerned with public procurement who advise contracting authorities on all types of procurement and at various stages of the procurement process.

Of the 27 interviews undertaken between April and June 2019, 5 of the interviews were carried out using face to face meetings with the remaining 22 interviews conducted over the telephone. The duration of the face to face meetings ranged between 1 hour and 1½ hours and the telephone interviews between 45 minutes and 1 hour. As a result of these interviews the research process produced a large quantity of data comprising recorded interviews, notes taken during the interviews and transcriptions of the interviews held with each of the 27 participants.

Due to the large number of data sources it would have been difficult to use a computerised software tool for the qualitative data analysis and so a manual analysis was undertaken according to the themes and questions explored in the Interview Guide.

In analysing the collected data an approach was followed advocated by Marshall and Rossman.⁵¹⁷ My understanding of the collected data was enhanced by listening to the recordings of the interviews before they were transcribed and then reading and rereading the material. This material was systematically coded and classified through a process of induction, the resultant information then being reviewed.

The data from participants was organised and categorised into the themes and patterns based on the responses to the questions from the Interview Guide. I reviewed and tested the information by evaluating the issues identified in the theoretical analysis against the data and searched for explanations and answers to the issues. This enabled me to identify any patterns before I commenced writing up my analysis of the information obtained from the data.

⁵¹⁷ Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (6th edn, Sage Publications 2016) 217.

By engaging in a detailed scrutiny process and grouping the data collected from participants I was able to review the responses against the questions set out in the Interview Guide in order to provide a meaningful understanding of the changes to the public procurement rules from the perspective of practitioners undertaking public procurement and those who advise on the procurement process.

Due to the small sample of participants I have not opted to present the responses as percentages and have therefore mentioned the number of participants commenting on or responding to any issue rather than based on a percentage.

I stated the anonymity of participants when they were recruited for the research which was again confirmed in the Participation Information Sheet sent to each of the participants in advance of an interview to encourage them to be candid in their comments. The responses of the participants are presented using a specific referencing system with the acronym PE for Procuring Entities and CL for Consultants and Legal Advisers. The participants in each category are numbered consecutively according to the order in which they were interviewed.

As noted in the Literature Review in Chapter 1, there is a scarcity of scholarship covering EU public procurement law, as well as a scarcity of scholarship dealing with the practical implementation of UK procurement law. In relation to this literature the most noteworthy is perhaps the two books by Arrowsmith. While these books provide a detailed analysis of black letter law, they do not however examine the impact of the laws in practice. There is therefore a significant gap in the knowledge which this thesis seeks to address by making available in the scholarship, for the first time, the unique perspectives of procuring entities and consultants and legal advisers, obtained through qualitative interviews. As far as the researcher is aware, no other work of scholarship has made these important perspectives on the practical implementation of procurement law in the UK available before.

These perspectives are presented within the six sections referred to earlier, namely:

- 5.2.1 A General questions on related issues to the research.
- 5.2.2 B Selection Criteria
- 5.2.3 C Contract Award Criteria
- 5.2.4 D Framework Agreements

- 5.2.5 E Abnormally Low Tenders
- 5.2.6 F Conclusion question on the four themes in Sections B to E inclusive.

5.2 Responses of the participants and analysis of their comments

5.2.1 Section A – General questions on related issues to the research

Q.A1 Can you provide a reasonable estimate of the total number of above threshold public procurements conducted by you on behalf of your organisation and the number of Clients you have provided advice to since the introduction of the Public Sector Directive 2014 and the PCR 2015 which transposed the Directive into law in England, Wales and Northern Ireland.

Responses from procuring entities

Participants PE03, PE05, PE06, PE07 and PE14 all confirmed that since the new rules they had each undertaken between 15 and 30 above threshold procurements covering services, works and supplies. Participant PE11 stated they had only undertaken 4 above threshold procurements but participants PE01, PE02 and PE12 said that their organisations had each undertaken between 70 and 80 above threshold procurements. One participant PE08 confirmed that they had undertaken in excess of 100 above threshold procurements. Participants PE12 and PE14 both stated that they had also undertaken public procurements in connection with Dynamic Purchasing Systems⁵¹⁸ and several below threshold procurements.⁵¹⁹

Participants PE09, PE10 and PE13 stated that had procured only Framework Agreements under the new rules and the quantities were given as 6, 7 and 15 respectively.

⁵¹⁸ Article 34 of the Directive 2014/24/EU and Regulation 34 of the PCR 2015.

⁵¹⁹ Article 4 of the Public Sector Directive sets out the threshold limits for public works contracts, public supply and service contracts for central government and sub-central contracting authorities together with public service contracts for social and other specific services listed in Annex XIV to the Directive and Regulation 5 of PCR 2015 refers to the amounts in Article 4 and the value in pounds sterling to be taken to the value determined by the Commission and published from time to time in the Official Journal in accordance with Article 6 of the Directive.

Responses from consultants and legal advisers

The participants who were legal advisers stated that they had been requested to advise on over 150 procurements each since the new rules came into operation. Some of the areas covered by the advice are contained within responses to questions in Sections B to F inclusive in this section of this Chapter.

Participants CL03, CL04, CL05, CL06 and CL13 confirmed that they had each been involved in between 20 and 25 procurements. Participants CL01, CL02, CL09 and CL10 stated that they had each undertaken between 50 and 100 procurements since the introduction of the new rules.

One participant CL07 stated that they had only been involved in 6 above threshold procurements but a number of below threshold procurements.

All the participants who are Consultants in this category confirmed that they had in the main been involved in the procurement of works and services.

Analysis

This first question in the general section of the Interview Guide was a lead in question to obtain details of the public procurements in which the participants had been involved so that their experience of and levels of knowledge and understanding on the operation of the new rules in practice could be considered. The experience of the use and the effect of the new rules in practice is a fundamental element of the research to show an understanding and knowledge of the effect of the changes covered by specific theme questions in the Interview Guide.

The responses of all the participants in both categories showed through the number of procurements in which they had been involved that they had extensive experience of the procurement process.

Q.A2 Do you consider that the introduction of the new procurement rules has simplified the operation of the procurement process and made their use more flexible?

Responses from procuring entities

(a) Simplification of the operation of the new rules introduced by Directive 2014/24/EU and PCR 2015.

In relation to the new rules simplifying the operation of the procurement process 7 of the 14 participants agreed but one participant said *“in some areas we have found this to be the case but overall we did not deem the old procurement rules to be restrictive but some of the new rules have been found to be quite restrictive and made conducting procurements more complicated”*. Participant PE06 said *“the major areas of simplification had been found to be the introduction of the ‘light-touch regime’⁵²⁰, Regulation 72,⁵²¹ and the new ‘competitive procedure with negotiation’⁵²²*. Participant PE06 said *“the addition of Part 4 to the PCR 2015 was positive and simplified the procurement procedures as with reserved contracts for certain services.”⁵²³*

One participant said that overall they considered the new procurement rules are now more transparent in use. Participant PE09 said *“the introduction of the Standard Selection Questionnaire at selection stage of the new rules has simplified our procurements and made the process more transparent”*.

Participant PE10 said *“a clearer framework for use has been provided by the rules which can be operated so I think the rules are now simpler and clearer although they can still be improved but they are certainly an improvement”*. Another participant PE12 said *“we consider the rules have not made the process more difficult than before but where they have been made a little simpler, the changes were not ground-breaking in practice”*.

⁵²⁰ Light-touch regime for Health, Social, Education and certain other Service Contracts as set out in Schedule 3 of the PCR 2015 (Annex A). There is in Articles 26 and 48 of the 2014 Directive a lighter procurement regime for non-central Contracting Authorities.

⁵²¹ Article 72 of the 2014 Directive and Regulation 72 of the PCR 2015 – Modification of Contracts during their term.

⁵²² Article 29 of the 2014 Directive (Regulation 29 of the PCR 2015).

⁵²³ 118th Recital and Article 77 of Directive 2014/24/EU (Regulation 77 of the PCR 2015).

Participant PE01 said “*I consider the procurement process is now harder and the rules have not been simplified or made the process more flexible*”. This view was also held by participant PE13 who also stated that the rules are still complex and in places leave room for interpretation which requires more legal advice than under the old rules. Participant PE07 said “*no, they are not simplified and if you want to simplify do not provide a 127-page document which due to its content needs advice from lawyers and consultants.*” Participants PE01, PE11 and PE13 stated they did not accept that the rules had been simplified, however the only area which they considered have been simplified in operation was the use of the Dynamic Purchasing System process.

(b) Flexibility of the new rules

In relation to making the rules more flexible participant PE07 agreed that the implementation of the competitive process with negotiation was “*an important change*”. Participant PE12 also agreed the rules are more flexible but further improvements could have been made to assist users in the procurement process. Participants PE01, PE11 and PE13 did not accept that the rules had been made more flexible.

Responses from consultants and legal advisers

(a) Simplification of the new rules

As noted, there were 13 participants in this category, 9 of these participants mentioned that the new rules had simplified the procurement process. In this group participant CL01 said “*we think the new regulations have a positive impact on procurement*”, and similarly participant CL04 also remarked that “*the new rules had achieved some simplification but in other areas the rules have been made more complex*”.

Participant CL05 said “*I think the rules are now more transparent and there is now a clearer process for Article 12 (Regulation 12)*”⁵²⁴ “(public contracts between entities within the public sector) Participants CL06 and CL09 welcomed the introduction of a Competitive procedure

⁵²⁴ Article 12 of Directive 2014/24/EU and Regulation 12 of the PCR 2015 – Public contracts between entities within the public sector.

with negotiation with participant CL09 saying that there is nothing simple in public procurement but it is often how complex a contracting authority makes a procurement when undertaking the procurement process. Participant CL09 also stated that simplification had been assisted by the introduction of electronic communication and referred to Article 53 (Regulation 53)⁵²⁵ in relation to the electronic availability of documents. This statement was confirmed by participant CL04 who also said that some contracting authorities were looking at creative ways of not having everything absolutely ready when the contract notice is published to meet the availability of procurement documents requirement. Participant CL08 confirmed the benefits of Article 53 (Regulation 53) and the introduction of the Selection Questionnaire and Competitive procedure with negotiation.

Participant CL07 said he considered the new procurement rules had not made a lot of difference but there are benefits to Regulation 53. Participant CL10 said the new rules had not simplified the procurement process. In relation to Regulation 53 participant CL02 said *“the introduction of Regulation 53 (on the availability of procurement documents) has not simplified the procurement process but has added complication in practice.”*

Participant CL03 said that the introduction of the new rules had made very little difference to their procurement process although Regulation 84⁵²⁶ about reporting and a requirement to advertise on Contracts Finder⁵²⁷ in accordance with Regulation 106 had not assisted the procurement process.

(b) Flexibility of the new rules

In relation to whether the changes have made the use of the rules more flexible, one participant CL02 considered that the rules make the process slightly more flexible but not to a great extent. 4 other participants said the rules were more flexible. Participant CL11 said there was no significant difference regarding flexibility in the terms of the standard procedure used in the procurement process. Participant CL13 said some of the rules are now less

⁵²⁵ Article 53 of Directive 2014/24/EU and Regulation 53 of the PCR 2015 – Electronic availability of procurement documents.

⁵²⁶ Article 84 of Directive 2014/24/EU and Regulation 84 of the PCR 2015 – Reporting and documentation requirements.

⁵²⁷ Regulation 106 of the PCR 2015 – Publication of information on Contracts Finder where contract notices are issued. This is an additional rule for Part 2 Procurements to be found in Part 4 – Chapter 7 of the Regulations and is specific to the PCR.

flexible and participant CL12 said flexibility had only been introduced at post-tender stage and not in the procurement process.

Analysis

This question was set in the Interview Guide as a lead in question to explore whether the introduction of the new procurement rules had simplified the operation of the procurement process in practice and provided more flexibility in use.

In relation to the new rules simplifying the operation of the procurement process, there were concerns across both categories however there were still some questions as to the level of simplification in use and points raised that the new rules were not ground-breaking in practice. There was also the reverse view that in practice the procurement procedures were now harder and further that the rules have not simplified or made the procurement process more flexible.

In relation to specific changes to the rules there was little reference by the participants in practice to the many reforms and modifications covered by the Directive and the Regulations which would have any effect on the operation and delivery of procurements. Reference was however made to a limited number of changes such as the light-touch regime, Articles 12, 53, 72, 84 and 106 (Regulations 12, 53, 72, 84 and 106 respectively) and the new competitive procedure with negotiation available to contracting authorities. It is notable that other changes to the procurement rules which were designed to simplify and make more flexible the operation of the procurement process were not highlighted by participants in their responses. For instance, the participants did not mention that there was simplification of the procurement process or flexibility in areas such as

- conflicts of interest,⁵²⁸
- pre-procurement market engagement,⁵²⁹
- the shortening of maximum time limits which contracting authorities must allow for economic operators to respond to notices to submit tenders,⁵³⁰

⁵²⁸ Article 24 of the Directive 2014/24/EU (Regulation 24 of the PCR 2015).

⁵²⁹ Article 40 of the Directive 2014/24/EU (Regulation 40 of the PCR 2015).

⁵³⁰ 80th Recital, Article 27 of the Directive 2014/24/EU (Regulations 26-32 of the PCR 2015).

- the new choice of award procedures⁵³¹
- that bidders can be excluded for past performance
- clarification on irregular and unacceptable tenders⁵³²
- new offences under the exclusion grounds provision⁵³³.

The analysis of the responses indicated a lack of familiarity with all the changes to the new rules.

Q.A3 Did the introduction of the new procurement rules lead to either new training procedures / techniques or retraining procedures for your procurement team to meet the changes?

Responses from procuring entities

Seven of the participants in this category stated that they had carried out training for their staff on the new rules. In relation to individual participants PE08 said *“a detailed training regime on the application of the new rules especially in the areas of Competitive procedure with negotiation and the ‘light-touch regime’ provisions was undertaken as we also procure social and associated services and we have used the training to build on knowledge previously held on public procurement”*. Participant PE12 said *“that training was provided for some of their staff, the first training on public procurement we have ever undertaken”*.

Participant PE02 said they had set in place and then undertaken a retraining programme to cover the changes in the rules. One of the participants PE03 said *“they had only undertaken refresher training”* and participant PE11 stated they had undertaken limited training for their staff. Participant PE14 only carried out initial training sessions which were then developed by their own lawyers and through the Local Government Association. Participant PE13 said that they undertook some retraining but had specific training on the procurement of Framework Agreements.

⁵³¹ Article 59 paragraph 6 and Article 6 of the Directive 2014/24/EU (Regulation 67 of the PCR 2015).

⁵³² Regulation 26(5) of the PCR 2015.

⁵³³ 100th Recital, Article 57 paragraphs 1(d) and (f), 105th Recital paragraph 6 and Article 61 of the Directive 2014/24/EU (Regulations 57 and 61 of the PCR 2015).

Participant PE09 said they had not undertaken any formal training processes and participant PE10 stated they did not carry out any training or retraining in relation to the new rules.

Responses from consultants and legal advisers

Participants CL01, CL02, CL05, CL08 and CL09, all of which are consultants, confirmed that they recognised the need for training and their organisations had undertaken new training to help them to better understand the rules. From this group participant CL02 said *“we have undertaken a large amount of both training and retraining of staff”*. Participant CL03 said *“we did not carry out any formal training or retraining but obtained limited advice from our legal advisers”*.

Participant CL04 said *“after reviewing the rules we were able to put them into use as the new rules had not significantly changed enough for undertaking either any training or retraining”*. Participant CL06 said *“as the new rules were similar, we only considered the elements of the revised time scales and the new provisions of Competitive procedure with negotiation and Innovation Partnership”*⁵³⁴. Participant CL07 said *“we did not undertake any training or retraining procedures as following review we became aware of the changes to be implemented”*. Participant CL10 said *“we basically retrained ourselves with limited advice from a leading firm of procurement lawyers”*.

Participant CL08 said that *“in addition to initially undertaking training on the new rules we subsequently ran awareness training sessions for a number of our clients.”*

When questioned none of the Legal Advisers in this category provided information on any training or research they had undertaken in relation to the new rules.

Analysis

This question was set in the Interview Guide to explore how the participants obtain their knowledge on the new procurement rules, their responses being considered with Question

⁵³⁴ Article 31 of the Directive 2014/24/EU (Regulation 31 of the PCR 2015).

A4. Training and development of those involved in the procurement process not only provides knowledge and development of staff and management but also sets the goals for efficiency and to assist all those involved in performing their duties.

A total of 12 of the participants across both categories stated that they had undertaken training for their staff on the new procurement rules. Only one participant confirmed that they had undertaken a detailed training regime and another participant stated that for some of their staff it was the first training on public procurement they had ever undertaken. This raises a question on the level and expertise of the staff being employed to undertake public procurement even under supervision.

Although one participant had undertaken a retraining programme, several other participants in both categories had not undertaken any training or retraining on the new rules whilst others considered that as the rules had not significantly changed, they did not warrant any training or retraining.

It was significant to note that whilst some respondents considered certain changes to the rules required training, other respondents stated that they had trained themselves or received limited training. A number of respondents also stated that no training or retraining was required at all in relation to the new rules.

The introduction of the new procurement rules places a high level of requirement on organisations for the training of staff so that they can fully understand all the changes, reforms and modifications to the rules and their impact on the operation of the procurement process and the delivery of the contract to be awarded. The training on such important matters should be provided to all levels of staff as in relation to skilled and experienced staff it has been said that currently the public purchasing (procurement) sector is experiencing a skills gap.⁵³⁵ As the public sector continues to find it hard to attract and retain staff,⁵³⁶ training to provide skills and expertise is extremely important and the responses of participants support this statement.

⁵³⁵ Leanne Edwards, 'Dynamic Purchasing Systems and the Death of procurement frameworks', available at www.procuroious.com/procurementnews/dynamic-purchasing-systems-and-the-death-of-procurement-frameworks p3.

⁵³⁶ Joshua Pritchard and Rose Lasko-Skinner : *Please procure responsibly : The state of public service commissioning* (The Reform Research Group 2019) 33.

Despite investment, public bodies continue to have difficulty in recruiting and retaining skilled and qualified staff who can undertake and apply the new rules in the procurement process. The resultant failures and lack understanding I have found in practice are set out in section 2 of Chapter 2. It was from this list that I selected the four themes for my research which is detailed in section 2 of Chapter 3. The technical nature and the need to comply with legislation and regulations the recruitment and retention of suitably qualified and experienced procurement staff is essential for public bodies.⁵³⁷ This supporting statement relates to the Welsh Government, however the principle is applicable to all public bodies undertaking procurement in the public sector.

Q.A4 If the answer is Yes, what type of training or retraining procedures were adopted?

Responses from procuring entities

The participants who stated that they undertook training on the new procurement rules confirmed that the training took the form of training sessions, some in-house and some external, workshops and briefings given or held by training specialists such as the CCS⁵³⁸ or procurement lawyers. Some of the training however was said to be limited. Participant PE01 said “*they accessed some shared training on procurement*”

Participant PE13 who was from a Central Purchasing Body stated that most of their training sessions related specifically to changes in the rules on Framework Agreements. Participant PE02 said their retraining sessions given by a specialist were on specific areas such as the affect the changes in the rules would have on their documentation. Participant PE12 stated some of their training was undertaken at networking sessions.

Participants PE08 and PE14 said that following the initial training they have undertaken regular training sessions with both internal and external training providers.

⁵³⁷ Auditor General for Wales, ‘Public Procurement in Wales’ (Welsh Audit Office 2017) 71.

⁵³⁸ Crown Commercial Services

Responses from consultants and legal advisers

The participants who had stated that they undertook training on the new rules confirmed that the training took the form of training sessions, workshops and briefings, albeit on a limited basis. Participant CL03 said “*the training operated for staff only comprised being briefed by the person in charge of the procurement team*”.

Several of the participants who had undertaken training on the new rules confirmed that they continued with the initial training by way of continuous professional development, attending courses and briefings on case law run by legal advisers.

Analysis

This question from the Interview Guide is linked to Question A3 on whether the introduction of the new procurement rules lead to new training/techniques or retraining for the procurement team to meet the changes.

Some participants mentioned the areas of the training provided but no details as to the content, number or duration of the sessions or workshops undertaken were provided. No details were volunteered as to whether training provided just related to the new rules and case law. There was also no reference to training on the operation of the new rules in practice with examples of how the rules should be applied in all stages of the procurement process to ensure the procurement but especially whether the award criteria is legal and public resources are being spent in line with applicable criteria.

The responses received from participants only confirms my experience in practice that practical training on the application of the rules focusing on the procurement process is required. The absence of practical training I intend to address by the development of a practical training programme with an operational toolkit with technical support.

Summary and overview of this Section A

With respect to this Section A (General questions on related issues to the research) one of the most important findings of this research is that, even though the participants all had extensive

experience of the procurement process, in practice, the majority of respondents demonstrated a lack of familiarity with all the changes to the new rules. This is a very important finding because, while in theory the introduction of the new procurement rules were intended to simplify the operation of the procurement process and provide more flexibility in use, in practice, because of the lack of familiarity of procuring entities and consultants and legal advisers with the new rules, this objective was not being achieved in practice. This is a key finding which, as far as the researcher is aware, has not been made elsewhere in the scholarship.

Another significant finding of this research is that, in spite of this lack of familiarity with the new rules, training on the new rules is only offered occasionally to procuring entities, and consultants and legal advisers, even though some respondents considered that training was highly desirable. Some respondents stated that they had trained themselves or received limited training. Several respondents also stated that no training or retraining was required at all in relation to the new rules.

Finally, another significant finding of this research which is reflected further from the responses to Sections B to F, is that there were generally mixed and contradictory views as to whether or not the new rules had indeed brought more simplification and flexibility to the procurement process. This is a very important finding, as it calls into question the objective of the new rules to bring in simplification and flexibility into the procurement process. As far as the researcher is aware, no existing work of scholarship has made a similar finding based on empirical evidence. This thesis therefore makes an important contribution to knowledge in this regard.

5.2.2 Section B Selection Criteria

Q.B1 Although the general headings of Selection Criteria are similar under the previous rules, the list of possible Selection Criteria is still an exhaustive one. How does your organisation select the Criteria for each individual procurement?

Responses from procuring entities

In relation to the selection of criteria for each individual procurement, all 14 participants in this category agreed that the general headings of Selection Criteria are similar to those in the previous rules. With the exception of participant PE09 who uses PAS91 for every procurement as a policy of their organisation, all the participants now follow the statutory guidance on supplier selection stage in the form of the Standard Selection Questionnaire issued by the Crown Commercial Service (CCS) to comply with the guidance issued.⁵³⁹ On the subject of the similarity between the selection criteria in the current rules and those in the old rules, PE04 confirmed that the selection criteria had not changed dramatically between the old and new regulations. This participant did however note that with the introduction of the CCS Selection Questionnaire they had changed their own standard questions to line up with the questions in the CCS Selection Questionnaire. Importantly the participant noted that they now ensure that the questions in the Selection Questionnaire are relevant to the procurement and proportionate to the procurement being considered.

In relation to the use of the CCS Selection Questionnaire in practice, one participant PE02 said *“at first we did not use the Selection Questionnaire because we thought that it was quite restrictive to try and change some of those additional elements. However, we have subsequently taken some additional legal advice and now find that if the questions that we're wanting to ask are topic related to the fair work in question, there's not an issue with the change if they are linked to that which is being procured.”*

⁵³⁹ Crown Commercial Service, Procurement Policy Note : Standard Selection Questionnaire Action Note 8/16, 2016.

Another participant PE06 raised a concern in the Selection Questionnaire, *“As from the grounds stated you cannot deviate from section one and two, this is very onerous and there are some areas of ambiguity when providing detailed information.”*

As a result of the statutory guidance to be followed by the introduction of the Selection Questionnaire at selection stage, participant PE01 stated that as part of the action at this stage they now undertake a formal market consultation before starting the procurement process and participant PE07 said *“We now look at what the business needs, and then we will select the criteria based on the individual needs of the business”*. This point was confirmed by participant PE14 who stated that before completing the Selection Questionnaire they work with stakeholders and then prepare the selection criteria so that it is unique to the procurement.

Participants PE05, PE10 and PE13 said in respect of Selection Criteria that they use both PAS91 and the Selection Questionnaire dependent on the procurement. Participant PE11 stated that they use PAS91 in the main but have also on a limited number of instances used the Selection Questionnaire. Participant PE09 said its organisation only operates PAS91 for works, services and supplies as it provides a level playing field across all the procurements.

Responses from consultants and legal advisers

When asked how do you choose the Selection Questionnaire for each individual procurement three of the participants in this category who are all legal advisers remarked that they rarely advise on selection criteria or the selection stage as this was undertaken by their Clients.

One participant CL08 (a legal adviser) who has been instructed on several occasions to advise on selection criteria and completion of Selection Questionnaires said *“we review the guidance issued with the Selection Questionnaire and consider it against the procurement to be carried out based on it being reasonable and proportionate to the procurement.”* Six of the participants mentioned that they followed the statutory guidance in the CCS Selection Questionnaire to meet selection criteria. Participant CL02 said *“the CCS Selection Questionnaire provides a lot of choice and indicates what can and cannot be asked but in certain areas offers no flexibility which is a concern when completing the document. Obviously, the criteria have to be relevant to the subject matter.”*

Participant CL01 also noted that they use both the CCS Selection Questionnaire and PAS91 to choose selection criteria, however before compiling the CCS Selection Questionnaire they have meetings and workshops with their Clients to go through all the selection criteria available and determine those criteria appropriate for the type of procurement. In certain cases, other criteria were added if required.

In addition to the points made by participant CL08 and participant CL01, Participant CL10 noted *“for their Clients they have developed a sort of quasi selection questionnaire which basically mirrors the CCS Selection Questionnaire that collects the required information. PAS91 has in the past been considered and, in some instances, they have used it for the selection criteria.”*

Participant CL06 said *“the CCS Selection Questionnaire is a starting point but in terms of further selection criteria to those contained are often difficult and we have to discuss and agree with the Client”*. However Participant CL04 stated *“we do not use the Selection Questionnaire but follow PAS91 which although very cumbersome and wordy gives you a better opportunity, but the questions do then separate the wheat from the chaff. As all the selection criteria is covered, they only add two or three selection questions although some of our Clients have not allowed us to edit PAS91 in any way, so we have followed these instructions.”* Another participant CL07 said *“they found PAS91 to be far too complicated and with the selection criteria was not relevant to what is being procured”* and participant CL09 said *“PAS91 has too many sections including areas specifically applying to central government only and has to be carefully reviewed”*.

The other 11 participants all agreed that the general headings were similar to those in the previous rules. Participant CL09 confirmed they used PAS91 at selection stage but for certain non-construction procurements they use the CCS Selection Questionnaire.

Analysis

All the participants in the category of procuring entities and 11 of the participants in the second category of consultants and legal advisers agreed that the general headings for selection criteria are like those under the previous rules. None of the participants referred to

changes under the new rules in relation to both mandatory and discretionary exclusion criteria in Article 58 of Directive 2014/24/EU or Regulation 58 of the PCR 2015. In this regard participants did not query the structure of the CCS Selection Questionnaire but relied on the contact.⁵⁴⁰ It was accepted by participants that the selection stage is key in gathering information and to make assessments of prospective economic operators before proceeding to the next stage which covers reviewing track records, financial and economic information on economic operators and whether they can meet the various criteria. Participants recognised the importance of selecting the correct criteria for assessing suitability under the Open Procedure or using the appropriate criteria for short listing or invitation, but no specific reference was made by most participants to any procedures followed or operated by their organisations at this stage in a procurement.

The selection stage for public procurements is based in the main on the CCS Selection Questionnaire.⁵⁴¹ This document containing statutory guidance ‘on the process for the selection of economic operators. Within the guidance there is also reference to PAS91⁵⁴² which has a limited operational base as stated in the document and covers works contracts and contracts for goods and services needed in relation to works contracts. The use of the CCS Standard Selection Questionnaire or PAS91 was recognised by all but four of the participants who undertake public procurement. There was a strict reliance placed on the selection criteria contained within the CCS Standard Selection Questionnaire and PAS91 by participants.

In relation to the CCS Standard Selection Questionnaire specific reference was made to the content of Part 1 (potential supplier information) and Part 2 (exclusion grounds) of the Selection Questionnaire but not to the limited changes or additions to the questions in Parts 1 and 2 permitted to be made. It was however recognised by participants that some deviations are permissible in Part 3 of the CCS Selection Questionnaire, where set out in the Guidance Notes to the CCS Selection Questionnaire and that they must be reported. Participants did recognise that this Part 3 was an extremely important element of the selection stage.

⁵⁴⁰ Sue Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (3rd ed, 1(11) Sweet & Maxwell 2014) 1186-1187

⁵⁴¹ Crown Commercial Service, Procurement Policy Note : Standard Selection Questionnaire Action Note 8/16, 2016.

⁵⁴² Publicly Available Specification PAS91 : 2017 + A1 : 2017, British Standards Institution.

It was noted that several participants that they had prepared additional project specific questions relating to the potential economic operator's professional or technical ability, but few mentioned that any such questions must be relevant and proportionate to the contract. There was however reference made to the type of additional questions to be asked which would then become a specific selection criterion.

Several of the participants stated that they have used formal market consultation prior to the settlement of the selection criteria in the Selection Questionnaire and others said they consulted with clients and stakeholders on areas which could be considered as additional selection criteria. In either case no specific examples were provided to show how the requirements were then selected for criteria in respect of a procurement and the methodology to show they meet the proportionality and relevancy tests.

From the responses to this particular question some participants considered that the structure of the two mandatory documents at selection stage, these being the CCS Selection Questionnaire and PAS91, had simplified the selection stage of a procurement. A few of the participants considered that the use of such documents made the selection stage more difficult and did not provide flexibility which they considered had been available in the past.

Q.B2 There have been changes in the new rules in relation to financial and economic criteria. How has your organisation addressed the criteria especially in relation to Contracts in Lots and reviewed the forms of evidence which are required to be provided at Selection stage?

Responses from procuring entities

Regarding how the changes in the new rules in relation to the financial and economic criteria, all the participants in this category stated that they followed the required criteria for financial and economic standing which were either set out in Section 4 of Part 6 of the CCS Selection Questionnaire or Module C2 in PAS91.

One participant PE08 stated that *“the finance questions in the Selection Questionnaire were very vague, incredibly weak for evaluation and hindered the process and although set to*

benefit SMEs were in fact very complicated from an economic operator's perspective".

Accordingly, this participant stated they used a new tool with an additional set of new criteria for their specific procurements which is provided to economic operators at selection stage for completion. This document also contained the methodology of evaluation and the ratios to be operated in respect of assets and liabilities.

In respect of the specific financial and economic criteria in the rules a change that was referred to by only 6 of the participants was in relation to the minimum yearly turnover that economic operators are required to have, this being not exceeding twice the estimated contract value.⁵⁴³ This matter was queried by two of the participants in relation to Framework Agreements which although an estimated total value could be calculated, this could however be disproportionate and be a barrier for many economic operators. Participants PE04, PE05, PE06 and PE08 all mentioned a further change concerning the use of ratios between assets and liabilities which are to be taken into consideration together with the methodology for such consideration.

One participant PE04 said "*our approach to evaluation for financial criteria had not changed under the new rules*". PE05 said they always requested further financial and economic information to that referred to in the Selection Questionnaire as they consider the requirements were not sufficient. In relation to thresholds for turnover, PE06 stated that they did not state a requirement for twice the estimated turnover but indicated either a one or one and a half times calculation. Participant PE07 who follows Module C2 of PAS91 stated they issued supplementary questions and required further financial information to that covered in PAS91.

Participants PE12 and PE13 said "*the financial and economic criteria set out in the Selection Questionnaire was a grey area of public sector procurement with regards to the requirements and evaluation process*". PE13 also confirmed this point when using PAS91.

In respect of contracts divided into lots participants stated they either applied the minimum yearly turnover for each lot or combined the overall value of all the lots against the minimum turnover test.

⁵⁴³ Article 58(3) of Directive 2014/24/EU and Regulation 58(9) of the PCR 2015.

The forms of evidence required from economic operators where financial information is to be provided under PAS91 was said to be reviewed by accountants or accounting staff and considered against Credit Agency Reports and other financial data. In relation to the operation of the CCS Selection Questionnaire where financial information is not required to be submitted unless specifically requested, participants said they used only confirmation of available Credit Agency Reports and checks. Where required specific financial information is requested with full checks undertaken on those economic operators selected before confirmation and further financial information is requested.

Responses from consultants and legal advisers

In relation to changes in respect of economic and financial standing, three of the participants who are all legal advisers confirmed that they had not been asked to advise clients on the application or evaluation of financial and economic criteria. Except for CL09, all the other nine participants in this category stated that they follow the requirements of Section 4 in Part 6 of the CCS Selection Questionnaire in relation to financial and economic standing criteria. One participant CL09 stated that they use Module C2 in PAS91 for the financial and economic standing criteria but are often required by their clients to add additional financial requirements to suit. Participant CL03 confirmed that they consider the questions in the CCS Selection Questionnaire are not detailed enough to meet their requirements and so provide several other financial questions to those in the CCS Selection Questionnaire. These additional questions they considered where reasonable and proportionate to the type of contract being procured.

In relation to the specific financial and economic criteria in the rules, all the participants were aware of the minimum yearly turnover that economic operators/suppliers are required to have, which is not exceeding twice the estimated contract value. Only participant CL04 referred to ratios between assets and liabilities being taken into consideration as the specified methodology of evaluation. Participant CL04 also said *“that our approach has not changed between the old and new rules but our pre-set financial criteria which is additional to the Selection Questionnaire could be varied from contract to contract”*.

Participant CL06 stated that they always include within the Selection Questionnaire reference to a turnover test based on one time or one and a half times but not twice the estimated contract value. Participant CL10 stated that most of their clients set a requirement for the criteria to include a provision for 'Constructionline' certification for economic operators which is then taken into consideration in the evaluation process.

In respect of contracts divided into lots, participant CL01 said they estimate the financial threshold per lot and evaluate accordingly. The remaining nine participants said they would treat each lot on its own financial merits and apply either the minimum yearly turnover rule per lot or combine the overall value of all the lots against the minimum turnover test.

Regarding forms of evidence required at selection stage, where financial information is to be provided under PAS91 clients of the participants carried out Credit Agency checks and / or analysis by accountants or client's financial teams. When operation of the Selection Questionnaire had been made dependent on the requirements of the clients, a credit check was undertaken and where required financial information requested to be provided by the economic operator, this was sought at that time.

Analysis

All the procuring entities and other participants who are consultants confirmed that they use the requirements set out in either the CCS Selection Questionnaire or PAS91 for economic operators to complete. Under PAS91 supporting financial and economic standing information is required to be returned. It was however noted that the minimum requirements for financial and economic standing in PAS91 was not enough and further financial information was requested. In this regard no details were provided of the type of information sought. This information in my experience relates to assets and liabilities together with ratios and often management accounts are requested especially if financial accounts are out of date.

In relation to the Selection Questionnaire, participants said that even though the submission of financial information was a requirement, it did not impose specific requirements including documentation which would ensure that the economic operators possessed the necessary economic and financial capacity to perform the contract. This includes annual accounts and ratios between assets and liabilities and the information for evaluation and any specific

criteria specified by the contracting authority, so they are transparent, objective and non-discriminatory. This specific requirement complies with Article 58(3) of Directive 2014/24/EU and Regulation 58(10) of PCR 2015.

Although the participants referred to the minimum yearly turnover rule, they did not state that in clearly justified cases dependent on the special risks attached to the nature of the works, services or supplies, this rule could be changed. In this regard contracting authorities must state their main reasons in the procurement document. I have found that this requirement which is covered in Article 58(3) of Directive 2014/24/EU and Regulation 58(9) of PCR 2015 is not known by those undertaking procurements and is however only applied if specifically drawn to their attention.

None of the participants referred to the optional provision in the CCS Standard Selection Questionnaire or PAS91 that an economic operator may be allowed to demonstrate through a parent company guarantee that it has the necessary financial resources at its disposal.

In respect of where a contract is divided into lots, a procedure which the Regulations include as a drive to encourage small economic operators, participants only touched on the clear provisions in Article 58(3) of Directive 2014/24/EU and Regulation 58 of PCR 2015 for the application of the economic and financial requirements to each individual lot. The new rules do however cover contracts based on framework agreements together with the methodology to be applied but this provision was only mentioned by one participant.

Participants did not refer to the fact that any minimum financial requirement should be clearly stated and the methodology for assessing economic and financial standing must be clearly described. No participant stated that the questions in the Selection Questionnaire assume that the information will only be required from the winning economic operator. In addition, no participant referred to the method of financial assessment operated depending on the requirements, however if a different method of financial assessment is used to that in the Selection Questionnaire then this needs to be reported as a deviation.

The failure of participants in their responses to this question to mention the points I have highlighted. I consider this is attributable to a lack of awareness by those undertaking the procurement process of the intricacies of the rules. In addition, several participants appeared

to follow systems in their own organisations whether or not the procedure took into consideration full compliance with the rules. There is the need in relation to lack of awareness and operation of the rules for training on not only understanding the rules but the application of the rules in practice.

Q.B3 How has your organisation considered and verified technical and professional ability of economic operators including their efficiency, experience and performance in previous contracts?

Responses from procuring entities

Except for participant PE04, the other participants stated that they drafted additional project or category specific related questions and added to the general in Section 6 in Part 3 of the CCS Selection Questionnaire or Module C1 in PAS91. These participants confirmed this was to better establish professional or technical ability. Participant PE10 considered the basic questions in the Selection Questionnaire are too generic and not helpful and so additional questions have to be asked. Participants PE02 and PE05 stated they ask very detailed questions in addition to the CCS Selection Questionnaire and PAS91 and then evaluate these and take up the references which have been requested to be provided by economic operators. Participant PE04 confirmed they rely wholly on the responses of economic operators to the questions in the Selection Questionnaire and only undertake a limited evaluation.

Participant PE05 stated they have prepared a detailed template for evaluation and for each of the references. Participants PE07, PE08 and PE10 all take up references and evaluate but participant PE09 does not now require references at selection stage. Participant PE14 stated that they have a rigid approach in the evaluation of the additional or supplemental questions and often use weightings in the scoring and evaluation methodology.

Participant PE13 who uses PAS91 have drafted and incorporate detailed supplementary questions on the knowledge, skills and experience of economic operators as part of the technical or professional requirements and procedures. Two Case Studies of past projects relating to the subject procurement are requested to show the experience, efficiency and performance of the economic operator. The case studies and the responses to the additional

questions are then reviewed and evaluated. Details of the evaluation structure are also provided to economic operators with PAS91.

Responses from consultants and legal advisers

Two participants who are legal advisers stated that they are rarely consulted by clients on either the questions on technical and professional ability or verification of responses by economic operators. Participants CL08 and CL13, also legal advisers, said they had been consulted to advise on the inclusion of questions in Section 6 of Part 3 of the CCS Selection Questionnaire in relation to complex procurements.

Except for participant CL10 all the participants had drafted and included additional or project related questions to the standard questions in either Section 6 of Part 3 of the Selection Questionnaire or Module C1 of PAS91 to establish professional or technical ability. Participants CL01, CL03 and CL10 have additional or supplementary questions on relevant case studies, either one or three dependent on the procurement. Participants CL02 and CL03 require experience details for services contracts going back three years and for works contracts for five years although participant CL03 has recently restricted both services and works to three years. Participant CL02 said *“that the evidence provided by economic operators is often poor and this may be due to contract management of projects”*.

Participants CL04, CL06, CL07 and CL08 confirmed that they provide a scoring matrix to evaluate the professional or technical ability of economic operators in their responses to questions which also cover experience and performance of previous contracts. Participants CL04 and CL05 require, take up and then evaluate references provided by economic operators in response to the additional or supplementary questions. Participant CL08 stated that they no longer require references as they found the information to be difficult to follow up and evaluate. They now rely wholly on additional project related questions to evaluate. Participant CL10 stated they predominately follow the Open Procedure and so although a single case study is requested, technical ability and capacity is valued on a pass/fail basis. In this regard they only consider recent contracts, this requirement being provided to economic operators by way of additional information with the CCS Selection Questionnaire.

Analysis

There is no consensus on the part of the participants in relation to the evaluation of professional or technical ability. It was agreed that economic operators are required to have enough level of experience. Several participants stated that information had been obtained by several methods, but no specific information was provided during the interview. The CCS say that past performance can be demonstrated by suitable project references and include in Section 6.1 of the CCS Selection Questionnaire relevant experience and contract examples to be provided. Participants in their responses did not refer specifically to Section 6.1 of the Selection Questionnaire or Table 13 of PAS91 in relation to the provision of references and supporting documentation.

Participants did not state that details of contract examples or references can now be from either the public or private sector if they are relevant to the requirement. In the case of the CCS Selection Questionnaire the references provided should be where the names customer is willing to provide written evidence to confirm the accuracy of the information provided. In relation to the contracts provided these should have been performed during the last three years for services and the last five years for works contracts.

Several the participants say they ask further questions so they can evaluate experience and efficiency, these questions being relevant to the requirements. None of the participants provided any information on the type of questions to be answered by the economic operators which I have found covered areas of specific experience and expertise in the areas of the subject procurement. There was no reference to the method of verification of responses that was undertaken or how the evaluation process was carried out. No information was provided to show how the responses from smaller businesses would be evaluated on a basis that would not be discriminatory or disproportionate.

There was no reference by participants to how they considered Question 6.2 in the Selection Questionnaire in relation to a potential economic operator proposing to use sub-contractors.

The requirement for efficiency of economic operators together with their experience and performance on previous contracts is a fundamental part of the selection process. It was further noted that participants did not provide details of any robust processes or procedures in

this regard not only to obtain information but in the consideration and requirements of such information. All these elements are basic requirements so that the economic operators can be selected for the procurement who are experienced and have the capability, capacity and financial stability for the proposed contract. The responses from participants clearly raise questions as to their understanding of the requirements and practical training is required to remedy this situation.

Q.B4 Has your organisation changed its evaluation methodology of the Selection Criteria under the Open Procedure and the Restricted Procedure?

General introduction on the Open and Restricted Procedures

Under the Open Procedure⁵⁴⁴ which is a single stage procedure, any interest economic operator may submit a tender in response to a call for competition/contract notice. The tender submitted is to be accompanied by the information for qualitative selection that has been requested by the contracting authority.

By operating the Restricted Procedure⁵⁴⁵ which is a two-stage procedure, any economic operator may submit a request to participate in response to a call for competition and provide the information requested by the contracting authority for qualitative selection. Following the evaluation by the contracting authority only those economic operators so invited may submit a tender which forms the second stage of the procedure. Under this procedure the contracting authority may limit the number of suitable candidates to be invited to participate in the procedure and submit a tender.⁵⁴⁶

Responses from procuring entities

Participants PE01, PE11, PE13 and PE14 said that they have not changed their methodology for evaluation on either the Open or Restricted Procedures, which has been selected for use.

⁵⁴⁴ Article 27 of Directive 2014/24/EU and Regulation 27 of the PCR 2015.

⁵⁴⁵ Article 28 of Directive 2014/24/EU and Regulation 28 of the PCR 2015.

⁵⁴⁶ Article 65 of Directive 2014/24/EU and Regulation 65 of the PCR 2015.

Participant PE06 stated “*our evaluation processes have changed due to the rules and are now more rigid in operation*”. Participant PE10 said “*our evaluation processes for selection criteria are now more explicit in their structure and operation due in the main to case law, challenges and advice they had been given*”. Regarding changes in evaluation processes, participants PE04 and PE06 said that they had changed their evaluation processes and methodologies for procurements under both the Open and Restricted Procedures.

It was further stated by participant PE06 that “*there was however not clear guidance by the CCS in their Selection Questionnaire on the evaluation of the Open Procedure which should be reviewed especially as the CCS are encouraging the use of the Open Procedure by contracting authorities and also in the procurement of the CCS’s Framework Agreements.*”

Participant PE08 who confirmed that all of their above threshold procurements are operated under the Open Procedure said “*the only change to their evaluation methodology resulted from the use of the Selection Questionnaire which they find insufficient in structure even for the Open Procedure and so they add supplementary questions based on a case by case basis for each individual procurement, these questions being evaluated.*”

Participant PE02 said “*we have changed our evaluation methodology, but it had left us with processes which are now less flexible in use*”. This participant did not however provide information on the areas which make their process less flexible.

Responses from consultants and legal advisers

Two of the participants who are legal advisers said that they have been consulted on matters relating to the evaluation methodology at selection stage, one of these being for a complex project.

Eight of the participants confirmed that they had not changed their evaluation methodology of the selection criteria under the new rules. One participant CL08 stated that they have reviewed their evaluation methodology for both the Open and Restricted Procedures under the new rules. Participant CL03 said they use the restricted and competitive procedure with negotiation and have never used the Open Procedure. Participants CL03, CL04 and CL07 stated they do not use the Open Procedure whereas participant CL09 said they are now using

the Open Procedure more often than the Restricted. Except for participant CL04 all the participants who operate the Open Procedure undertake the evaluation of economic operators purely on a pass or fail basis. Participant CL04 said “*we evaluate a method statement completed by economic operators which was extracted from the experience section of the CCS Selection Questionnaire but understand that we are not supposed to follow a route to reduce economic operators and therefore not invite them to tender*”.

Analysis

Except for one participant who found the changes in the rules had made their process less flexible, there was no concerns expressed on the part of the participants on the changes to the evaluation methodology under the new rules. This applied to both the Open and the Restricted Procedures. This was surprising as several the participants stated they had changed their evaluation processes under both procedures. It was unclear from responses as to why they changed their evaluation methodology.

Both the Directive and the PCR 2015 are silent on the matter of the evaluation of Selection Criteria especially the use of weightings and scoring, however the Court’s decision in the case of *Universale-Bau v Entsorgungsbetriebe*⁵⁴⁷ indicates that scoring can be used in the Restricted Procedure. None of the participants referred to Article 65 of Directive 2014/24/EU or Regulation 65 of the PCR 2015 in relation to the reduction of the number of qualified candidates who would be invited to participate. From the responses received the participants had their own methodologies of evaluation for both procedures which they followed. Whether these procedures are in fact compliant was not covered by this question or formed part of the interview process.

In relation to information on the requirements of contracting authorities for participation, there was no reference to or examples given by participants to indicate the minimum levels of ability together with the appropriate means of proof which they had set and if these levels had been changed under the new rules.

⁵⁴⁷ Case C-470/99 *Universale-Bau AG v Entsorgungsbetriebe Simmoing GmbH* [2002] E.C.R. I-11617.

On the matter of evaluation of the economic operators under the Open Procedure, the CCS state⁵⁴⁸ that selection questions should be used in line with the relevant procurement procedure as part of the tender pack to test whether a potential supplier meets the minimum levels of suitability. They further state that a declaration that the exclusion grounds have not been breached has to be provided with bids under the Open Procedure. No other information in relation to evaluation in the Open Procedure is provided by the CCS.

With the responses to this question relating to changes in the evaluation methodology of the selection criteria under both the Open and Restricted Procedures, no detail was provided on the actual changes which had been made in the approach under either of the procedures. As the understanding and proper execution of the evaluation methodology is extremely important for both procedures this raises a number of practical questions in the operation of procurements. Apart from the statements made by two of the legal advisers that they had been consulted on matters relating to the evaluation methodology, there appears from responses to be a lack of understanding of the requirements when undertaking procurements. Again, practical training could be considered to reduce this lack of understanding.

- Q.B5 (a) Does your organisation have a procedure for dealing with and remedying any conflicts of interest found when evaluating technical and professional ability.
- (b) Do you have a provision for a discretionary exclusion in the procurement documents where any conflict of interest is found during the procurement process?

Background information

Article 58(4) of Directive 2014/24/EU and Regulation 58(17) of PCR 2015 requires contracting authorities to consider conflicts of interest on the part of economic operators.

⁵⁴⁸ Crown Commercial Service Policy Note : Standard Selection Questionnaire Advice Note 8/16 9 September 2016 p3 and p6.

Responses from procuring entities

All but one of the participants in this category confirmed that they now had a procedure for dealing with and remedying any conflicts of interest found when evaluating professional or technical ability of economic operators. However, only participant PE09 said they had operated the procedure which after investigation had resulted in an economic operator being excluded.

Participant PE02 said that they did not have a procedure in respect of conflicts of interest and had not in any event had any conflicts of interest in the past. Participant PE06 stated “*we have only recently included this procedure as a result of case law and have added to our processes to include a separate conflict of interest declaration to be completed by economic operators together with non-canvassing and non-collusion statements*”. Participant PE12 stated “*we require a non-conflict of interest statement*”. Participant PE10 required economic operators to complete and sign a warranty document to confirm that they did not have any conflicts of interest.

All the participants referred to the provisions either in Section 3.1(g) of the Selection Questionnaire or Table 10 (reference QP4-5) in Module C3 of PAS91 under the heading of grounds for ‘discretionary exclusion’, the responses to which would then be considered as part of the review of submissions by economic operators. Action would be taken if a conflict of interest had been admitted and the required details of the circumstances provided were investigated.

Participant PE09 said “*within our procedure we also have a provision for the involvement of both external and internal examiners to review the details provided should any conflict of interest be admitted by an economic operator, however we have not had cause to operate our procedure which has clear provision in the documentation for discretionary exclusion of an economic operator if a conflict of interest has been found*” Participant PE12 said “*that we have a separate and specific conflict of interest statement to be completed by all candidates when we are procuring a dynamic purchasing system as a contracting authority*”.

Responses from consultants and advisers

Participants CL01, CL03, CL04, CL05 and CL09 all confirmed that they all now have a procedure for dealing with and remedying any conflicts of interest including those found when evaluating professional and technical ability. Participant CL06 said “*we do not have a distinct policy themselves but follow a policy of any individual appointing client.*”

Participant CL02 said they rely on the responses and any declaration made by an economic operator as in Section 3.1(g) of the Selection Questionnaire under the heading of ‘discretionary exclusion’. Seven of the participants also referred to either Section 3.1(g) of the Selection Questionnaire or Table 10 (reference QP4-5) in Module C3 of PAS91 as their understanding of declarations on conflicts of interest and that such provisions were grounds for discretionary exclusion. The matter of the wording for the provisions in the Selection Questionnaire and PAS91 in respect of conflicts of interest was drawn to the attention of the participants. They were asked ‘was the bidder aware of any conflict of interest’ and if the answer was ‘yes’ details of the circumstances were to be provided. All the participants in this category confirmed that they were fully aware of the declaration relating to discretionary exclusion.

Participant CL10 said “they had requested an economic operator to provide information in a situation where two companies from the same group were tendering for the same project although based on information provided the matter was fully resolved with one of the economic operators subsequently withdrawing to avoid any possible conflict of interest”

Participant CL03 said they also undertake their own conflict checks on economic operators but did not provide particulars. Participants CL05, CL06 and CL10 all said they have conflict of interest statements for tenderers to complete in the Tender Documents.

Except for one participant, the other eight consultants had not had to remedy any conflict of interest. Participant CL02 however said “*we have found the provision in the Selection Questionnaire on conflicts of interest to be purely a paper exercise and we have found many of our clients do not appear to be aware of Article 24 of Directive 2014/24/EU and Regulation 24 of PCR 2015 on conflicts of interest*”. All the participants who are legal advisers said they have never been asked to advise on any matter relating to Article 24 or

Regulation 24 or on the exclusion of an economic operator for a potential conflict of interest and participant CL08 stated that in their experience they had not seen an economic operator excluded for a conflict of interest.

Analysis

There was an awareness by participants of the requirements for dealing with and remedying any conflicts of interest found when evaluating professional or technical ability of economic operators and further that in both the CCS Selection Questionnaire and PAS91 conflicts of interest were included under the classification of grounds for discretionary exclusion. A review process for conflicts of interest was, except for one participant, not operated by participants. It is considered that the awareness shown by participants only results from the fact that declarations are required to be made by economic operators when completing the CCS Selection Questionnaire or PAS91.

With regard to conflicts of interest at the selection stage, none of the participants made reference to Article 58(4) of Directive 2014/24/EU and Regulation 58(17) of the PCR 2015 which has a clear statement that a contracting authority may assume an economic operator does not possess the required professional or technical ability where a contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract. Except for one participant who said their client appeared unaware of Article 24 of Directive 2014/24/EU and Regulation 24 of PCR 2015 in relation to conflicts of interest, no other reference to these rules were made. This Regulation requires contracting authorities to take appropriate measures to prevent and identify any conflicts of interest arising in the conduct of the procurement to avoid any distortion of competition and to ensure equal treatment of all economic operators. This would also include where an economic operator has had prior involvement in the preparation of the procurement procedure.⁵⁴⁹

None of the participants referred to a requirement for the reporting where conflicts of interest are detected, and the subsequent measures taken as part of Regulation 84(1)(i) of PCR 2015.

⁵⁴⁹ Albert Sanchez Graells, *Public Procurement and the EU Competition Rules* (3rd edn, Hart Publications Ltd 2015) 290-291

Although there is awareness of the matter of conflict of interest for the reasons I have previously stated, the understanding of what happens and the action to be taken by contracting authorities when conflicts of interest have arisen requires practical training to be provided to remedy the situation.

Summary and overview of this Section B

With respect to this Section B (Selection Criteria), a significant finding of this research is that all the participants in the category of procuring entities and the majority of the participants in the second category of consultants and legal advisers agreed that the general headings for selection criteria are like those under the previous rules. None of the participants referred to changes under the new rules in relation to both mandatory and discretionary exclusion criteria in Article 58 of Directive 2014/24/EU or Regulation 58 of the PCR 2015.

An important finding in this regard is that, from the responses to the questions in this Section some participants considered that the structure of the two mandatory documents at selection stage, these being the CCS Selection Questionnaire and PAS91, had simplified the selection stage of a procurement. A few of the participants considered that the use of such documents made the selection stage more difficult and did not provide flexibility which they considered had been available in the past.

A further important finding from the empirical research was the lack of awareness and knowledge of the changes in the rules on Selection Criteria on the part of most of the participants in the two categories. These important areas were shown as being financial and economic evaluation, the requirements for technical and professional ability and the remedying of conflicts of interest.

The researcher is unaware of similar findings based on empirical evidence on the lack of awareness and understanding of this area in practice.

5.2.3 Section C Contract Award Criteria

Q.C1 Have the latest provisions to the rules on Contract Award Criteria in relation to Most Economically Advantageous Tender (MEAT)

- (1) enhanced your organisation's understanding of MEAT?
- (2) now require your organisation to assess and evaluate Tenders differently and in which areas are the changes being undertaken?

Background information

Under Directive 2014/24/EU⁵⁵⁰ transposed into the PCR 2015⁵⁵¹ contracting authorities are to base the award of public contracts on the most economically advantageous tender (MEAT).⁵⁵² This is a new form of MEAT that encourages the evaluation of bids offering the best price/quality ratio which is different to the previous rules in the now repealed Directive⁵⁵³ and the Public Contracts Regulations.⁵⁵⁴

Responses from procuring entities

- (1) enhanced your organisation's understanding of MEAT?

On the question of how the latest provisions to the rules contract award criteria in relation to the Most Economically Advantageous Tender, most of the participants in this category confirmed that the new rules have not changed their approach. In addition, they confirmed it has not enhanced their organisation's understanding of the award criteria known as MEAT. One of the participants, PE12 from this group said, "*we found that the new rules have only reiterated certain areas and we had to take some legal advice on the correct procedures to be followed*". Participant PE10 said "*the rules have been improved and clarified the contract*

⁵⁵⁰ Directive 2014/24/EU of the European Parliament and Council of the 25 February 2014 on public procurement and repealing Directive 2004/18/EC.

⁵⁵¹ Statutory Instrument 2015 No. 102 – Public Procurement.

⁵⁵² Article 67(1) of Directive 2014/24/EU (Regulation 67 in the PCR 2015).

⁵⁵³ Directive 2004/18/EU Public Sector Directive [2004] O.J. L134/1.

⁵⁵⁴ Statutory Instrument 2006 No. 5 – The Public Contracts Regulations 2006.

award criteria for the award basis of MEAT but as our organisation has always been aware of these factors it is not considered that the new rules have enhanced our understanding”.

- (2) now require your organisation to assess and evaluate Tenders differently and in which areas are the changes being undertaken?

In relation to this element, Participant PE01 said “*we have changed our approach to the evaluation of tenders, but this cannot be attributed to the new rules*”. Participant PE02 said “*our evaluation process has not massively changed but we do look for more involvement of stakeholders both in the assessment and evaluation procedures*”.

Eight of the participants in this category confirmed that they have not changed their method of assessment or evaluation of tenders. Participants PE10 and PE11 stated that their organisations now assess and evaluate tenders differently in the methodology followed and the mixture of quality to price ratios or price only. Participants PE05 and PE09 stated that their organisations have only made slight adjustments to their approach in the assessment and evaluation of price and quality, but this has now been significantly linked on a project to project basis.

Responses from consultants and legal advisers

- (1) enhanced your organisation’s understanding of MEAT?

Five of the participants who are consultants within this category all confirmed that the new rules have not enhanced their organisation’s understanding of the award criteria known as MEAT or changed their approach to operating this criterion. Participant CL09 said “*the new rules have neither enhanced or not enhanced our understanding and we are not entirely sure that it was necessary to change anything*”.

Participants CL02 and CL05 stated that the latest rules on contract award criteria has enhanced their understanding of MEAT with participant CL02 commenting that their organisation had to undertake some specific training on the changes.

All four legal advisers in this category confirmed that the rules are not more specific and have advised their clients on a range of questions raised in relation to the award criteria in relation to MEAT.

- (2) now require your organisation to assess and evaluate Tenders differently and in which areas are the changes being undertaken?

Seven of the participants in this category confirmed that they are not assessing or evaluating tenders differently, however one of the participants CL05 in this group stated that other events have made them much more aware of getting the evaluation process right. Another participant in this group CL04 said that *“the biggest change in our opinion was the amount of information we have to provide up front to meet a far more onerous level of transparency”*.

Participant CL06 said *“yes, the evaluation structure has changed and we now discuss with our clients the quality to price ratio in more detail”*.

One of the legal advisers, participant CL08, said *“we have not found in the procurements we have advised upon a huge change in the types of evaluation criteria that contracting authorities are using to evaluate tenders since the introduction of the new rules. From what we see a lot of the time it is a cut and paste job of criteria from a previous procurement. With the exception however of high value and complex procurements, most of the award criteria is not well chosen and we are often instructed to advise and prepare award criteria”*. Another legal adviser confirmed that they are often instructed by their clients to review award criteria and evaluation methodology.

Analysis

- (1) enhanced your organisation’s understanding of MEAT?

In practice the best mix of quality and effectiveness is to also secure value for money⁵⁵⁵ in public procurement which is a policy of the UK Government.

⁵⁵⁵ HM Treasury, Managing Public Money-Annex 4.6, March 2018.

The significantly amended definition of the concept of Most Economically Advantageous Tenders was also drawn to the attention of procurers of public contracts in England and Wales as a requirement to award contracts in 2016 in a document issued by the Crown Commercial Services.⁵⁵⁶

In relation to whether the latest provision to the rules of contract award criteria has enhanced the understanding of MEAT, most responses from the participants in both categories confirmed that the new rules had not enhanced their organisation's understanding of the award criteria of MEAT. One participant stated that the new rules have only reiterated certain areas but they then took some legal advice on the correct procedures to be followed. Another participant who is a consultant stated that they had to undertake some specific training on the changes but did not confirm that following the training their understanding had been enhanced. Only two participants in the legal adviser category stated that the new rules had enhanced their understanding of MEAT.

It is noted that none of the participants considered the new rules had not enhanced their understanding of MEAT. In addition, none referred to the changes in the rules in the area of most economically advantageous tender or mentioned the requirement of award criteria in the new rules are to be linked to the subject matter of the contract.

- (2) now require your organisation to assess and evaluate Tenders differently and in which areas are the changes being undertaken?

The advance disclosure of the award criteria is a key function of transparency in the procurement process. The question of weightings given to each criteria must also be published in advance.⁵⁵⁷ There is however an exception to this requirement to publish weightings in advance if this cannot be done for objective reasons and in such circumstances there is an obligation to list the criteria in descending order of importance. The Court has held that any sub-criteria that will be applied in the evaluation must also be disclosed although a contracting authority is able to specify aspects of the sub-criteria at a later stage.⁵⁵⁸

⁵⁵⁶ Crown Commercial Services, The PCR 2015 and the Utilities Contracts Regulations 2016 – Guidance on Awarding Contracts, October 2016 p2.

⁵⁵⁷ Article 67 (5) of Directive 2014/24/EU (Regulation 67(9) of the PCR 2015).

⁵⁵⁸ Case C-536/06 Emm. G. Lianakis v Dimos Alexandroupolis [2008] EWHC 1583 (QB) B.L.G.R. 908.

The design of the tender evaluation procedure and the selected criteria is fundamental and needs to be carefully and fully constructed. There is a requirement for clarity not only for the ability of tenderers to interpret the criteria but to enable the contracting authority to apply them throughout the procedure.⁵⁵⁹ The award of public contracts on the basis of the most economically advantageous tender requires the design of the assessment and evaluation structure to be carefully drafted and also to be fit for purpose. The evaluation process must be structured to ensure that tenderers will be evaluated fairly to ascertain the most economically advantageous tender. Although contracting authorities have some discretion in devising the evaluation methodology the best price-quality ratio must be selected to suit the procurement which can ensure equal treatment and achieve relevance and proportionality.

Many the participants in each category stated that they are not assessing or evaluating tenders differently or have only made slight adjustments to their approach in the assessment or evaluation of tenders under the new rules. None of these participants refer to why their methodology of assessment and evaluation had not changed under the new rules or that their processes comply with the changes in the new rules. Three of the participants referred to quality and price ratio but no further information was provided in support of this selection.

One of the participants confirmed that they now assess and evaluate tenders differently following discussions held with clients. No information on the changes to the evaluation structure was provided in relation to the new rules.

It was noted that none of the participants referred to the identification of contract award criteria or the weightings for criteria and sub-criteria which must be selected at an early state as they must be published in advance. In addition, none of the participants stated whether the changes in the new rules had enhanced their understanding and whether the changes had simplified the process. Many of the participants confirmed that they had not changed their method of evaluation. The reason for this situation is unclear and more awareness training on a practical basis is required.

⁵⁵⁹ Case T-345/03 *Evropaiki Dynamik v Commission* [2008] E.C.R. 11-341.

Q.C2 How does your organisation select and assess the Contract Award Criteria for each individual procurement under the new rules and do you have a review procedure so that the contract award criteria is linked to the subject matter and ensures effective competition?

Responses from procuring entities

Participant PE01 confirmed that they have selection and assessment procedures for the contract award criteria which follows a generic template on a contract by contract basis, the process containing a review procedure and the final selection being linked to the subject matter of the procurement. Participant PE02 said *“we do not use the same award criteria for each framework we procure and so there is no standard approach. We work with customers in the selection process and to ensure effective competition”*.

Participant PE03 said *“our procedure prevents the same award criteria being selected and is now focused on the subject matter. This has been changed under the new rules to provide confidence in the bidder’s ability to show they do what we want them to do”*. Participant PE04 said *“we do have an internal procedure for the selection and assessment of contract award criteria incorporating a scrutiny process which ensures the award criteria are relevant and proportionate to the procurement”*.

Participant PE05 confirmed that they have a procedure for the selection and assessment of the contract award criteria which are linked to the subject matter. Participant PE06 stated that they have a procedure where the criteria are discussed and reviewed and then selected at board level. Participants PE10 and PE12 both confirmed that they have a selection and assessment procedure for contract award criteria which is determined on a case by case basis dependent on the procurement. Participant PE12 also said *“we limit the number of questions and have an evaluation procedure which also helps identify which tenders really want the contract”*.

Participant PE14 said *“the selection and assessment procedure for contract award is set and agreed at an initial meeting with stakeholders which includes a review procedure”*.

Participant PE08 said *“we have a review procedure with qualitative questions linked to the subject matter of the procurement”*.

Participants PE07 and PE09 both stated that they do not have a procedure as each procurement is reviewed on an individual basis with the involvement of either a category manager in conjunction with stakeholders or a board member. Participant PE09 also said *“there is a high level of competition for our framework agreements and the review process is set accordingly”*. Participant PE11 said *“we do not have a formalised process but consult those team members who would be managing the contract on a contract specific basis”*.

Participant PE13 said *“the nature of framework tenders requires the development of individual assessment and selection of criteria for each framework and then we tailor to the specific framework category which is often influenced by pre-tender market engagement”*.

Responses from consultants and legal advisers

Participant CL01 said *“we have a process for the selection and assessment of contract award criteria for particular procurements which is based on briefing sessions and workshops which are held for each individual procurement”*. Seven of the participants in this category, all of whom are consultants, confirmed that they had procedures for the assessment and selection of contract award criteria for individual procurements. In this group CL03 confirmed that their process was linked to the client and participant CL06 stated that they had a standard list of contract award criteria which was incorporated in their procedure and participant CL09 confirmed their process ensured effective competition.

Participant CL07 said *“we do not have any set procedure for the selection and assessment of contract award criteria but would propose criteria to our client linked to the subject procurement. Subsequent review with the client would be undertaken on the final list”*.

Participant CL08, a legal adviser, confirmed that the award criteria had to be linked to the subject matter of the procurement but in advising clients they had found that some criteria were very generic and not clearly linked. Advice had been provided on specific criteria such as key personnel for a project and the difficulties in evaluation. All the other legal advisers have advised clients to ensure that the criteria selected are linked to the subject matter and the selected criteria met the requirements of transparency, equal treatment and non-discrimination. One participant CL12 said *“we had found that clients had just copied and*

pasted criteria from previous procurements which were not in fact linked to the subject matter”. Another participant CL13 said “we had found that some clients had a common misconception that they had free reign to use whatever criteria they wanted which were often not linked to the subject matter of the procurement”.

Analysis

According to Recital 89 to the Directive the notion of award criteria is central to Directive 2014/24/EU. It is further stated in the Directive that it is therefore important that the relevant provisions be presented in a simple and streamlined way. The overriding concept for this action being obtained by using the terminology of the most economically advantageous tender.

Within sub-section 3 of the Directive there are provisions for contract award criteria which are then contained in Article 67 of the Directive. There are similar provisions in Regulation 67 of the PCR 2015. In Article 67(1) of the Directive and Regulation 67(1) of the PCR 2015 the award of a public contract based on the most economically advantageous tender is to be assessed from the point of view of the contracting authority.

Article 67(2) of the Directive and Regulation 67(3) of the PCR 2015 state the assessment of the criteria including qualitative, environmental and/or social aspects are to be linked to the subject matter of the public procurement in question and then further provides some examples and states that such criteria may comprise such criteria.

Although the contracting authority has some discretion in selecting the contract criteria it does not however give the contracting authority the power to use a procurement to promote social improvement generally and this should be considered and amended at the review stage. This review stage reinforces the selection of the contract award criteria and should comply with the general principles of equal treatment, transparency, non-discrimination, relevance and proportionality.

In practice the correct selection and application of the published award criteria will determine with whom a contracting authority will contract for goods, services and works and so this area must merit an extensive commitment of time and resources. How the selection of

contract award criteria is undertaken by a contracting authority together with the methods of weighting and basis of scoring followed by the evaluation of the contract award criteria is therefore fundamental to the procurement to be undertaken.

The importance of the selection, application and then evaluation of the contract award criteria is one of the areas most commonly scrutinised by tenderers. This can be when tenderers review the procurement documents at Tender Stage or following receipt by tenderers when they have received a notice of decision to award a contract or conclude a Framework Agreement to consider whether a challenge should be brought by a disgruntled tenderer.

Several the participants in both categories confirmed that they have a procedure in place for the selection and assessment of contract award criteria. Many of the participants stated that their procedures ensure that the award criteria are linked to the subject matter of the procurement. Some participants however said that they did not have a procedure in place for the selection and assessment of contract award criteria.

The matter of a review procedure was referred to by several the participants in both categories but only one participant confirmed that their review procedure ensured effective competition. No details of the review procedure were provided or how it was considered with the final selection. The responses from the legal advisers confirmed that they had provided advice to clients to ensure that the award criteria selected are properly selected and linked to the subject matter of the procurement and meet the requirements of transparency, equal treatment and non-discrimination.

Within the responses none of the participants indicated how they selected the published contract award criteria or the type of award criteria. No information was provided on how they assessed and presented the criteria with methods of weightings and scoring. None of the participants referred to the concept of most economically advantageous tender in relation to the award criteria.

The absence of information in the responses of participants on the procedures for selection and assessment of contract award criteria or any review procedures to ensure the contract award criteria is linked to the subject matter and meets the requirements of transparency, equal treatment and non-discrimination raises concerns. This situation could be caused by

lack of training or understanding of the new rules in these areas and therefore there is a requirement for practical training and review.

Q.C3 How does your organisation identify the basis of price or cost for a particular proposed procurement using a cost-effective approach and in which areas has the cost-effective approach changed since the introduction of the new provisions?

Responses from procuring entities

Participant PE01 said “*we review the procurement and then set the most effective approach taking into consideration cost rather than price and this change in approach can be attributable to the new rules*”. Participant PE02 said “*we identify the requirements and look at the best cost-evaluation model which would best work for the procurement. The new rules have given us more insight in relation to the basis of cost*”.

Participant PE03 said “*we have always looked at price base or price cost and this has not changed*”. Participant PE04 said “*our identification of price cost has become more sophisticated and the way we conduct the identification through commercial assessments has changed. We now operate cost breakdown models and life cycle costing where appropriate with the intention to provide value for money*”. Participant PE05 said “*we have created a range of standard models and are working with our solicitors to stress test some additional sustainable sector cost models as well on price*”. Participant PE06 stated that they use a specific price approach generally after review of budget estimates for a project or the type of evaluation.

Participant PE07 said “*we consider the complexity of the procurement and then decide which elements to include in our price models. This change has not resulted from the new rules but through business changing the view we take.*” Participant PE08 also confirmed the operation of a whole life approach⁵⁶⁰ for a project in relation to cost and define this on a project by

⁵⁶⁰ Whole Life Costing (WLC) is a methodology for the systematic economic consideration of all whole life costs and benefits over a period of time analysis as defined in the agreed scope. This is different to Life Cycle Costing (LCC) which is the cost of an asset throughout its cycle of life whilst fulfilling the performance requirements.

project basis. Participant PE10 confirmed they identify the pricing structure on a whole life cost basis.

Participants PE11, PE12 and PE14 all stated that they have not changed their cost-effective approach which is still based on a high price ratio for the procurement. Participant PE13 stated that as they generally procure Framework Agreements, they do not use price models but undertake research on the best price methodology for both evaluation and use at Call-off stage from a Framework Agreement.

Responses from consultants and legal advisers

Participant CL01 said “*we identify the best price and cost for a particular procurement with our client and look at the type of procurement i.e. works or services.*” Participants CL02 and CL04 stated they focus on the best price ratio for a particular procurement and participant CL03 confirmed that they use schedules of rates and other cost evaluation methodologies often based on a very accurate pre-tender estimate.

Participant CL06 said “*we define the requirements and then agree the commercial model to use which could involve schedules of rates or the development of a cost model.*” Participants CL07 and CL09 both stated the basis of price or cost depends on the client’s needs and in this regard, they have operated several price mechanisms and models. Participant CL10 confirmed they identify a combination of price and cost methodologies based on the requirements of the actual procurement.

One of the legal advisers stated that when working with and advising clients in connection with procurements they have not seen a change from the old rules in the way contracting authorities’ approach, evaluate or decide on price or cost. Two of the other legal advisers stated that they have not advised in this area but another said “*we have found that there is a common misconception with what contracting authorities are entitled to do in relation to price and cost and how this feeds into the procurement itself.*”

Analysis

Under Article 67(1) of the Directive and Regulation 67(1) of the PCR 2015 contracting authorities are to base the award of public contracts on the most economically advantageous tender as assessed from the point of view of the contracting authority on the basis of the price or cost using a cost effective approach. This may be identified based on price or cost⁵⁶¹ and can now include a best price/quality ratio. A cost-effective approach can be life cycle costing in accordance with Article 68 of the Directive and Regulation 68 of the PCR 2015.

The concept of cost refers to not just the initial price but also other costs over any stage of the life cycle of a product.⁵⁶²

When undertaking the identification, the basis of price or cost can determine the outcome of a competition and assist in a bias for low offer tenders. The selection of the cost effective approach has to be carefully undertaken and the question of whether a cost model has been used not only to obtain what is the right cost but the financial elements from the whole life calculation.⁵⁶³ The effective approach taken can also set a basis for value for money which has been defined as securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods/services purchased.⁵⁶⁴

Many of the participants stated that they review the procurement and then take into consideration cost rather than price and use cost models and other cost evaluation methodologies often based on accurate pre-tender estimates prepared by Quantity Surveyors. Other participants prepare and operate Price Models, some with a whole life approach. A number of participants stated they followed a process of identification and commercial assessment, but no details were provided. Only one of the participants referred to the intention to provide value for money.

⁵⁶¹ Article 67(2) of Directive 2014/24/EU (Regulation 67(2) of the PCR 2015).

⁵⁶² Recital 96 of Directive 2014/24/EU.

⁵⁶³ Government Commercial Function of the Cabinet Office. The Central Government Guidance on Outsourcing Decisions and Contracting, February 2019 p29.

⁵⁶⁴ Cabinet Office, The Outsourcing Playbook, Central Government Guidance on Outsourcing Decisions and Contracting, February 2019.

In relation to Framework Agreements, one participant stated they do not use price models but review research on the best price methodology for the procurement of the Framework Agreement and then at Call-off stage from the Framework Agreement.

It is noted that several the participants did not have an understanding on what contracting authorities are entitled to do in relation to price and cost and how these feed into the procurement itself. This has led to different interpretations of what contracting authorities can do. The lack of understanding could result from a lack of training of the changes to the new rules and therefore further training is required.

Many of the participants stated that they had not changed their cost-effective approach under the new rules which is based on a high price ratio, but no information was provided as to the approach being adopted and whether it was compliant with the new rules.

Q.C4 Has your organisation used Life Cycle Costings as part of the best price/quality ratio and has the information for the requirement for Life Cycle Costing simplified the setting and evaluation of the criteria? In the event the answer is ‘yes’, please explain.

Responses from procuring entities

Eight of the participants in this category confirmed that they had not considered life-cycle costing as part of the best price/quality ratio for procurements they had undertaken. Within this group of participants PE02 and PE03 stated other parts of their organisations had used life cycle costing for particular procurements but did not provide any details or further comment.

Participant PE07 said “*we have as part of a cost model used a costing methodology but not life cycle costing*” and participant PE12 said “*we had with one of our clients used a variant of life cycle costing, not in respect of the best price / quality ratio but as part of the cost model for manufactured products*”.

Participants PE04 and PE06 said they had used life cycle costing as part of a best price/quality ratio but the application was extremely difficult. Some of the Tenderers qualified

their offers and provided difficult figures which resulted in inconsistent bids which then had to be clarified and then assessed before further consideration could be undertaken.

Responses consultants and legal advisers

Seven of the participants in this category who are all consultants confirmed that they had not either considered or used life cycle costing as part of the best price / quality ratio for procurements they had undertaken. Participant CL01 stated that they had been instructed by a client to look at whole life costing for a procurement but not life cycle costing as part of a best price / quality ratio. Participant CL09 said “*we have used life cycle costing on several occasions but we and our clients found that it was difficult to operate and assess the costs.*”

All the legal adviser participants in this category confirmed that they have not had to advise on procurements where life cycle costing has been used as part of a pricing model but one of the participants said “*some of our clients had stated that life cycle costing currently had limited use in their procurements for the works and services they were procuring.*”

Analysis

Article 67(3) of Directive 2014/24/EU and Regulation 67(5) of the PCR 2015 states that regarding award criteria which shall be linked to the subject matter it should also include factors involved in a specific process at any stage of their life cycle. Article 68 of Directive 2014/24/EU and Regulation 68 of the PCR 2015 refer to life cycle costing. Article 96 of Directive 2014/24/EU states that any common or mandatory EU method for conducting life cycle costing which applies in a sector can be used.

The introduction of more detailed rules on life cycle costing in Directive 2014/24/EU confirms the validity of life cycle costing which in turn should provide some form of encouragement to some contracting authorities to apply life cycle costing. Alternatively, there are specific rules and limits which were not previously present and may thereby increase the legal complexity associated with the application of life cycle costing.⁵⁶⁵

⁵⁶⁵ Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015) 191.

The methodology to be used to calculate life cycle costing has been introduced to reflect the general principles of transparency and equal treatment and case law on award criteria. Contracting authorities must set out the methodology which will be used for life cycle costing in the procurement documents and further then specify the data which is to be provided by tenderers and how the contracting authority will determine the life cycle costing on the basis of that data.⁵⁶⁶

There is also a change in the new rules on life cycle costing in that it is possible to include for environmental externalities and the method for the assessment of such costs is covered in Article 68(2) of Directive 2014/24/EU and Regulation 68(3) of the PCR 2015.

Directive 2014/24/EU contains specific rules on life cycle costing to assist in identifying value for money in the full life cycle of goods, works or services.

Many the participants in both categories confirmed that they had not visited life cycle costing as part of the best price/quality ratio for procurements undertaken.

One participant had been invited to look at whole life costing for a procurement but not life cycle costing as part of a best price/quality ratio. Two participants said they had used life cycle costing but found it very difficult to operate due to problems with the application and assessment of costs and so the new rules had not simplified the setting or the evaluation of the criteria. Another participant stated that life cycle costing had limited use in their procurements for the works and services being procured.

Some of the participants were aware of the changes in the rules which now define the parameters for the use of life cycle costing. There was however a large number of the participants that had not even considered life cycle costing in their approach for evaluating the most economically advantageous tender. Where life cycle costing had been applied it is unclear in practice as to whether those using this criterion had followed the provisions set out in Directive 2014/24/EU or the PCR 2015.

⁵⁶⁶ Article 68(2) of Directive 2014/24/EU (Regulation 68(4) of the PCR 2015).

None of the participants considered value for money which is a core objective of public procurement when responding to the question on life cycle costing.

There was either a lack of understanding of Life Cycle Costing due to the type of procurement the participants undertook where Life Cycle Costing may not be appropriate or they were not fully aware of the requirements in the new rules covering Life Cycle Costing especially in relation to environmental externalities. This latter area can be addressed with training.

Summary and overview of this Section C

This Section C (Contract Award Criteria) contains four questions which were drafted because there had been changes to the rules on this topic area. Under Directive 2014/24/EU transposed into the PCR 2015 contracting authorities had to base the award of public contracts on the most economically advantageous tender (MEAT). This new form of MEAT encourages the evaluation of bids offering the best price/quality ratio which is different to the now superseded Directive 2004/18/EC and the Public Contracts Regulations 2006.

Although the changes to the rules relating to contract award criteria are covered by literature there is no literature on the operation of the provisions in practice. In response to one of the Questions, the participants in both categories stated that the new rules had enhanced their understanding of MEAT but none made reference to the requirement that the award criteria must be clearly linked to the subject matter of the contract. Many of the participants stated that in relation to the evaluation and assessment of tenders, they had not changed their method of evaluation but did not provide reasons for this decision.

According to Recital 89 and Article 67 of the Directive with similar provisions in Regulation 67 of PCR 2015, the assessment of the criteria including qualitative, environmental and/or social aspects linked to the subject matter of the contract is required. As the contract award criteria will determine with whom a contracting authority will contract, this requirement demands an extensive commitment of time and resources. The responses of participants in this area showed a lack of understanding of the new rules in this area. In relation to identification and operation of price or cost referred to in the rules, many of the participants in both categories indicated a lack of understanding of the new rules with a number following

the procedures in place before the new rules were introduced. From the responses of the best price/quality ratio in the detailed rules from Article 67 of Directive 2014/24/EU and Regulation 67(5) of the PCR 2015 with the validity of the use of Life Cycle Costing indicated that there was not only a lack of understanding but also of awareness of the requirements of the new rules, especially in relation to Life Cycle Costing were, if operated, could add Value for Money.

5.2.4 Section D Framework Agreements

Q.D1 Which type of Framework Agreements are you using more under the new rules on Framework Agreements? Are these

- (i) Single supplier
- (ii) Multi supplier
- (iii) A mixture of both types.

Responses from procuring entities

Seven participants in this category confirmed that since the introduction of the new rules they operate a mixture of both types of Framework Agreements. Participant PE08 in this group stated that they generally operate only multi-supplier Framework Agreements. Participants PE02, PE05, PE11 and PE14 stated that they have in the past operated both types of Framework Agreements but now operate the multi-supplier type more than the single supplier Framework Agreement. Participant PE13 said that “*as a Central Purchasing Body we only operate multi supplier types*”. Participant PE09 said “*we only use single supplier Framework Agreements for all our procurements and our structure is not set up for multi-supplier Framework Agreements*”.

Responses from consultants and legal advisers

Eight of the consultant participants in this category confirmed that since the new rules they have on behalf of their clients operated multi supplier Framework Agreements. Participant CL03 said “*we have never used a single supplier Framework Agreement for our procurements*”. Participants CL05 and CL10 stated that they procure a mixture of multi supplier and single supplier Framework Agreements.

The legal advisers in this category stated that although they have advised on the use of Framework Agreements, they have not been involved in the selection of the Framework

Agreement to be operated by their client. One of the legal advisers said “*much of our involvement was ensuring compliance by clients with the requirements of Regulation 33*”.⁵⁶⁷

Analysis

Framework Agreements are regulated by Article 33 of Directive 2014/24/EU and Regulation 33 of the PCR 2015.

Directive 2014/24/EU aims at improving the system of Framework Agreements which is explained in Recital 60 to Directive 2014/24/EU. Within Article 33(1) of Directive 2014/24/EU and Regulation 33(2) of the PCR 2015 a Framework Agreement is defined as meaning

“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing the contracts to be awarded during a given period, in particular with regard to price and where appropriate, the quality envisaged”.

The aim of Directive 2014/24/EU is to improve the system of Framework Agreements⁵⁶⁸ and includes changes and clarifications to the provisions for Framework Agreements and Call-offs from Framework Agreements, the availability of two procurement methods under a Framework Agreement and new rules relating to multi-provider (supplier) frameworks with direct award procedures.⁵⁶⁹ The clarification covering the two methods of call-offs from agreements confirmed that the application of direct award and mini-competition in a multi-provider framework can only be available if both procedures are provided for by the framework.⁵⁷⁰

There are two types of Framework Agreement that can be applied dependent on the needs of a contracting authority. The basic distinction of the two types of Framework Agreement is

⁵⁶⁷ Article 33 of Directive 2014/24/EU (Regulation 33 of the PCR 2015) – Framework Agreements.

⁵⁶⁸ Lichère F and Richetto S, *Modernising Public Procurement : The New Directive* (DJØF Publishing 2014) 214

⁵⁶⁹ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing Ltd 2016) 222

⁵⁷⁰ Marta Andrecka, ‘Framework agreements, EU procurement law and practice’ (2015) 2 Procurement Law Journal 149.

that one Framework Agreement is concluded with a single provider (supplier) and the second type is concluded with multiple providers (suppliers).

Where a single provider (supplier) Framework is concluded with just one provider, the contracting authority enters into contracts with the supplier in accordance with the terms of the Framework but can also ask the supplier to supplement its tender to reflect more refined requirements.

Where a Framework Agreement is concluded with more than one economic operator, this Framework Agreement can be operated in one of the following ways:

- (1) An arrangement which sets out all the terms under which contracts may be called off without further agreement.⁵⁷¹
- (2) An arrangement which does not set out all the terms of the arrangement and under which contracts that will be awarded following mini competitions,⁵⁷² the procedure for which must comply with Article 33(5) of Directive 2014/24/EU and Regulation 33(11) of PCR 2015.
- (3) An arrangement which allows for both contracts to be called off without re-opening competition and using mini competitions.⁵⁷³ The decision as to which approach should be used must be made on objective criteria set out in the initial procurement documents.

In practice it has been found that multi-supplier (provider) frameworks are used more commonly than the single supplier framework particularly by central purchasing bodies as more organisations would use such an arrangement.⁵⁷⁴

Seven of the participants in the Procuring Entities category and two Consultant participants confirmed that they operated a mixture of both types of Framework. Other participants also confirmed that they predominately operated multi-supplier frameworks but have undertaken

⁵⁷¹ Article 33(4)(a) of Directive 2014/24/EU (Regulation 33(8)(a) of the PCR 2015).

⁵⁷² Article 33(4)(b) of Directive 2014/24/EU (Regulation 33(8)(b) of the PCR 2015).

⁵⁷³ Article 33(4)(c) of Directive 2014/24/EU (Regulation 33(8)(c) of the PCR 2015).

⁵⁷⁴ Marta Andrecka, 'Framework agreements, EU procurement law and practice' (2015) 2 Procurement Law Journal 132

single supplier Framework Agreements. One participant who is a Central Purchasing Body confirmed that they only operate multi-supplier Framework Agreements. Another participant, PE07 who is also a Central Purchasing Body, confirmed that they only use single supplier Framework Agreements for all their procurements.

All the participants whether they operate a multi-supplier Framework or a single supplier Framework Agreements provided any information on the operation of their Framework Agreements. In addition, none of the participants stated that their selection of a type of Framework Agreement has been simplified by the new rules.

None of the participants when discussing the type of Framework Agreement to be selected referred to any research into the requirements of users of the Framework Agreement when deciding on the appropriate type of Framework Agreement to be used. The lack of research was found by a commentator⁵⁷⁵ when undertaking a study on Framework Agreements and interviewing providers of Framework Agreements in the UK.

I consider that the responses indicated that many of the participants lacked understanding of the changes to the rules and the obligations imposed but followed processes previously in place.

Q.D2 Do you now find one of the types of Framework Agreements more appropriate than another in relation to

- (i) Particular types of contract – works, services or supplies.
- (ii) Sector related contracts – consultancy, construction works, cleaning and maintenance.

Have the new rules changed your choice on the type of Framework Agreement you consider more appropriate to your requirements?

⁵⁷⁵ Marta Andrecka, 'Dealing with legal loopholes and uncertainties within EU Public Procurement Law regarding Framework Agreements' (2016) 16(4) Journal of Public Procurement 522.

Responses from procuring entities

Nine of the participants in this category stated they all operate multi-supplier Framework Agreements for all types of contracts and in all sectors. They all agree that the new rules have not changed their choice of type of Framework Agreement for the required procurement.

Four of the participants, PE03, PE04, PE08 and PE09 stated that they select the type of Framework Agreement to suit their requirements and the particular sector within which they are procuring. All these participants also stated that the new rules have not changed their choice of the type of Framework Agreement to be used.

Participant PE07 confirmed that they only operate single provider (supplier) Framework Agreements for works and services and in all sectors. The new rules have not changed their choice as they have always operated single provider (supplier) Framework Agreements.

Responses from consultants and legal advisers

Five of the participants in this category stated that they all operated multi supplier Framework Agreements for all types of contracts and in all sectors. They all agree that the new rules have not changed their choice of the type of Framework Agreement for a required procurement.

Five of the participants CL02, CL05, CL08, CL09 and CL10 stated that they selected the type of Framework Agreement with their client to suit requirements and the sector within which they are procuring. All these participants also stated that the new rules had not changed their choice of the type of Framework to be used.

None of the participants who are legal advisers have been instructed by clients to comment on the selection of the Framework Agreement for a particular contract.

Analysis

In the previous question participants were asked which type of Framework Agreement is being used more than another. This question is asked to further explain the use of a particular Framework Agreement. One of the many reasons for using Framework Agreements is to achieve value for money and cost savings where applicable by the generation of economies of scale. In addition, there is a reduction in the administrative burden on contracting authorities by using Framework Agreements. In order to make the best use of Framework Agreements a contracting authority must analyse a series of variables in order to develop a Framework Agreement which meets their needs and demands. These factors often change but can include spending capacities and the contract management skills of the contracting authority. In addition, the expected participation and the characteristics of the supply market also need to be taken into consideration. Framework Agreements are widely used to procure supplies, works or services for which contracting authorities have or are aware there is a repeated need.⁵⁷⁶

The selection of the appropriate Framework Agreement for a particular contract or specific sector is therefore important to contracting authorities. Although the provisions on Framework Agreements in Directive 2014/24/EU and the PCR 2015 have largely remained unchanged there are however some uncertainties in the provisions which have not been addressed. Contracting authorities should however be aware of the provisions and where such uncertainties still exist when deciding on and selecting either a single provider (supplier) framework or a multi provider (supplier) framework. It has been said that the selection of either of these two types of Framework Agreement depends on the subject matter.⁵⁷⁷ From the responses this point has been made by several the participants, but no supporting information was provided.

Fourteen of the participants over both categories confirmed in responding to the question that they all operate multi provider (supplier) Framework Agreements for all types of contracts and in all sectors. A number of the participants stated that they selected the type of

⁵⁷⁶ Marta Andrecka, 'Framework agreements, EU procurement law and practice' (2015) 2 Procurement Law Journal 129

⁵⁷⁷ Marta Andrecka, 'Dealing with legal loopholes and uncertainties within EU Public Procurement Law regarding Framework Agreements' (2016) 16(4) Journal of Public Procurement 512.

Framework Agreement to either suit their requirements and the specific sector for which it is being procured or the specific requirements of their clients. None of the participants stated whether they had undertaken research as to the needs of the users of the Framework Agreement to be operated.

One participant confirmed that they operate only single provider (supplier) Framework Agreements for all works and services and in all sectors.

All the participants stated that the new rules have not changed their choice of Framework Agreement for a required procurement whether for works, services or supplies but did not confirm whether the new rules had simplified their choice of a type of Framework Agreement for a particular type of contract or sector.

Within the responses the participants did not refer to any policy by which they had selected a particular type of Framework Agreement or any process followed to show how their specific requirements were met.

None of the participants mentioned that multi-supplier Framework Agreements allow the achievement of best value for money or provides some security of supplies. This situation only confirms that which I have found in practice.

Q.D3 When procuring a multi provider Framework Agreement, which method do you operate to select the providers and place specific contracts?

Responses from procuring entities

Participants PE02, PE03 and PE13 said “*in our Framework Agreements we have provisions for two methods for operating the Call-off procedure to select the supplier and award contracts, these being mini-competition and Direct Selection without re-opening competition but we leave the selection of the procedure for Call-off to the contracting authorities using the Framework Agreements*”. Participant PE09 stated that they could not answer this question but said “*we only operate single supplier Framework Agreements and only have*

provision for Direct Selection which is then implemented by the contracting authority using the Framework Agreement”.

All the other participants in this category confirmed that they used mini competition as the main procedure for selection and awarding of contracts but had Direct Selection as their second procedure. Participant PE05 said *“they have operated on occasions the Direct Selection but due to specific reasons in their organisation had reverted to mini-competition only for the Call-off procedure”.*

Responses from consultants and legal advisers

All the participants in this category who are Consultants stated that in the Framework Agreements they had procured there was provision for both procedures of mini-competition and Direct Selection. Four of the participants in this group stated that as they only establish Framework Agreements, the final selection of the procedure is left entirely to the contracting authority using the Framework Agreement.

The legal adviser participants in this category all confirmed that they have been consulted by clients on the selection methodology for Framework Agreements with one participant stating that detailed advice had been given to one client on the mixture of direct award and mini-competition for a particular Call-off from a Framework Agreement.

Analysis

Directive 2014/24/EU and the PCR 2015 assert that it aims to increase flexibility in the rules on setting up and calling off from multi supplier Framework Agreements.⁵⁷⁸ This question is set to understand whether this is the position by considering the methods used by contracting authorities to select providers onto a framework and to award specific contracts.

⁵⁷⁸ Crown Commercial Service, The PCR 2015 and The Utilities Contracts Regulations 2016 – Guidance on Framework Agreements : An Overview, Key Points and Frequently Asked Questions p3 October 2016

The first stage to be considered by a contracting authority is the type of multi supplier arrangement that suits their requirements. Examples of these are:

- (1) Multi-supplier arrangements which set out all the terms under which contracts may be called off without further agreement.⁵⁷⁹
- (2) Multi-supplier arrangements which do not set out all the terms of the arrangement and under which contracts they will be awarded following mini competitions,⁵⁸⁰ the procedure for which must comply with Article 33(5) of Directive 2014/24/EU and Regulation 33(11) of PCR 2015.
- (3) Multi-supplier arrangements which allow both for contracts to be called off without re-opening competition and using mini competitions.⁵⁸¹ The decision as to which approach must be made on objective criteria set out in the initial procurement documents.

There are now three potential ways to operate the Call-off procedure to select the provider and place specific Contracts from a multi supplier framework, these being:

1. Mini competition or mini tender procedure which is a method for placing orders under a Framework by re-opening competition.⁵⁸²
2. Direct Award without re-opening competition.
3. Mixture of Direct Award and mini competition. This is a new concept and often referred to in practice as a hybrid, however this method further emphasises the need for transparency and competition. To operate this new procedure which is only applicable under the Regulations and not the Directive and only available where the Framework Agreement states that this system can be operated, the following conditions apply.

- (1) The procurement documents state that this route may be used;

⁵⁷⁹ Article 33(4)(a) of Directive 2014/24/EU (Regulation 33(8)(a) of the PCR 2015)

⁵⁸⁰ Article 33(4)(b) of Directive 2014/24/EU (Regulation 33(8)(b) of the PCR 2015)

⁵⁸¹ Article 33(4)(c) of Directive 2014/24/EU (Regulation 33(8)(c) of the PCR 2015)

⁵⁸² Sue Arrowsmith, *The Law of Public and Utilities Procurement – Regulation in the UK and EU* (3rd edn, 1 Sweet & Maxwell 2014) 1146

- (2) The framework sets out all the necessary terms governing provision of the work/supply/service being procured;
- (3) Objective criteria are set out in the procurement documents for the framework agreement and are applied to determine whether a call-off is directly awarded or goes on to a mini-completion;
- (4) The procurement documents specify which terms may be subject to the re-opening of completion. The CCS guidance⁵⁸³ gives this example “A direct award could be for those suppliers allocated to provide goods to a specific region and the accompanying objective criteria for selecting to re-open competition could be:
 - (i) the contract exceeds a set financial threshold,
 - (ii) the quantity of products required is over a certain level, or
 - (iii) the contract has particularly complex requirements.”

A Call-off Contract under a Framework Agreement will be a Contract between the Contracting Authority and the relevant supplier. A Contracting Authority must not use a Framework Agreement improperly or in such a manner as to prevent, restrict or distort competition. It must also comply with the general EU Treaty principles of non-discrimination, proportionality, transparency and equal treatment and therefore when undertaking any call-offs under a multi provider Framework Agreement it is paramount that the process is transparent to all the suppliers and further that everyone is treated equally.

Most of the participants confirmed that their Framework Agreements contained provision for two methods of operating the Call-off procedure and placing specific contracts. Some of the participants had the mini-competition procedure as the first option with the Direct Selection as the second procedure. No supporting information was provided in relation to the procedures in their Framework Agreements relating to the Call-off procedures.

In relation to the operation of the procedures for Call-offs, several the participants left the decision to the individual contracting authority who was going to use the Framework

⁵⁸³ Crown Commercial Service, The PCR 2015 and The Utilities Contracts Regulations 2016 – Guidance on Framework Agreements : An Overview, Key Points and Frequently Asked Questions p5 and 6, October 2016

Agreement. None of the participants provided information on the multi supplier option they were operating for the Framework Agreements.

The option for the hybrid system of a mixture of Direct Award and then mini competition was not mentioned by any of the participants as a provision within their Framework Agreements as a procedure of which they were aware and understood was now available for placing specific contracts.

Directive 2014/24/EU only regulates the procedure of awarding call-offs in a limited manner.⁵⁸⁴ There are uncertainties in relation to transparency at the award stage of call-offs from a Framework. The responses made by the participants indicate that they follow their own procedures in awarding Call-offs to providers. This supports my findings in practice where there is a lack of transparency with contracting authorities following their own procedures often whether or not they are set out in the Framework Agreement.

Q.D4 What types of objective award criteria do you use for the subsequent call-off of a contract from a Framework Agreement?

Response from procuring entities

Participant PE01 said “*the criteria were contained in the Framework Agreement, however for a specific call-off the criteria we used was for price only*”.

PE02, PE03 and PE13 all said they inform users of their Framework Agreements that the criteria shall be those as stated in the Framework Agreement but as they are not involved in the Call-off stage they allow the contracting authority to formulate the criteria to suit the call-off being procured.

Participant PE06 stated that they select the criteria for a Call-off from the Framework Agreement to suit the requirements of a specific Call-off which may not however follow the criteria set out in the Framework Agreement although they cover this provision in the

⁵⁸⁴ Marta Andrecka, ‘Framework Agreements, EU law and the practice’ (2015) 2 Procurement Law Journal 149.

Framework Agreement. Participant PE09 said *“we allow the selection of criteria by the users of the Framework Agreement although this is covered and allowed for in the Framework Agreement”*.

The other eight participants in this category stated that the award criteria they use for subsequent Call-offs from a Framework Agreement are those which are set out in the Framework Agreement but did not confirm whether the award criteria is objective and how the call-off links to the Framework Agreement.

Responses from consultants and legal advisers

Participants CL03 and CL10 said that for Call-offs from their Framework Agreements contracting authorities using the Framework Agreements in the main follow the criteria of price only as the qualitative criteria was covered when the Framework Agreement was originally procured.

The remaining consultant participant in this category confirmed that for Call-offs from their Framework Agreements they follow the objective criteria set out in the Framework Agreement. In this group participant CL02 said *“that legislation states the criteria to be used to award mini-competition or direct selection should reflect those criteria set out in the Framework Agreement which we follow”*.

One of the participants who are legal advisers said *“where they have been appointed to advise on Call-off criteria they tell their clients that the criteria should be those in the Framework Agreement unless specific amendments have been stated in the Framework Agreement”*. The other participants who are legal advisers also confirmed that Call-offs from the Framework Agreement either by re-opening competition or by direct award shall be made pursuant to the objective criteria set out in the procurement documents for the Framework Agreement.

Analysis

The requirement that the award criteria in a mini competition must be based closely on those for the Framework Agreement is stronger in Directive 2014/24/EU and PCR 2015 than those in the earlier Directive and the 2006 Public Contracts Regulations. Award criteria must be

set out in the procurement documents for the Framework Agreement. This ensures transparency when it comes to the application of the award criteria.⁵⁸⁵

Within a single supplier Framework Agreement, the award criteria for the call-offs will be the same as those for the establishment of the Framework Agreement. In the case of a multi-supplier Framework the matter of the award criteria is more complex and must be carefully considered. For a direct award without re-opening competition, the objective criteria and conditions should be clearly established in the Framework Agreement documents.⁵⁸⁶

In relation to ‘objective criteria’, these can be read by reference to those ordinary criteria set out in Article 67(2) of Directive 2014/24/EU and Regulation 67(3) of PCR 2015. The alternative approach would relate to any kind of award criteria which are set out in the procurement documents for the Framework and only limited by the general principles.⁵⁸⁷ This alternative introduces an inconsistency in the interpretation of award criteria and it is considered it is not correct to apply such an interpretation. In the context of a multi-supplier Framework Agreement with a direct award process, this second approach has been adopted.⁵⁸⁸

For multi supplier Framework Agreements with its mini-competition procedure, both the European Commission’s explanatory note on Framework Agreements⁵⁸⁹ and ⁵⁹⁰ are ambiguous on the terms of which award criteria are allowed. When establishing the award criteria, those from Article 67 of Directive 2014/24/EU and Regulation 67 of the PCR 2015 should be used and set out in the Framework Agreement.

Most of the participants confirmed that they use the award criteria set out in the Framework Agreement. One participant stated that they inform users of their Framework Agreements that the criteria must be those in the Framework Agreements but allow other contracting

⁵⁸⁵ Marta Andrecka, ‘Framework Agreements : Transparency in the Call-off Award Process’ (2015) 10(4) European Procurement and Public Procurement Law Review 227-230

⁵⁸⁶ Article 33(4)(a) of Directive 2014/24/EU (Regulation 33(8)(a) of the PCR 2015).

⁵⁸⁷ Sue Arrowsmith, *The Law of Public and Utilities Procurement Regulations in the EU and UK* (3rd edn, 1 Sweet & Maxwell 2014) 1141

⁵⁸⁸ Marta Andrecka, ‘Framework Agreements : Transparency in the Call-off Award Process’ (2015) 10(4) European Procurement and Public Procurement Law Review 227-230

⁵⁸⁹ European Commission Explanatory Note “Framework Agreements - Classic Directive” (CC 2005/03-rev/of 14.07.2005)

⁵⁹⁰ Article 33(5)(d) of Directive 2014/24/EU (Regulation 33(11)(d) of the PCR 2015).

authorities to formulate the criteria to suit the Call-off. Another participant stated the award criteria for Call-offs from Framework Agreements was price only as the other award criteria relating to the qualitative element had already been evaluated when the Framework Agreement had been procured.

Although reference was made to the award criteria being those set out in the Framework Agreement, the types of objective award criteria were not provided in support of their responses. It is therefore unclear as to whether the original award criteria are selected from those set out in Article 67 of Directive 2014/24/EU and Regulation 67 of the PCR 2015 or other criteria.

None of the participants in their responses provided any details of ‘objective criteria’ or whether their selection was linked to Article 67 or Directive 2014/24/EU or Regulation 67 of the PCR 2015. The responses of participants confirm my experience in practice that there is a lack of understanding of the requirements imposed by the law. One solution to this situation could be training of a practical type which would also cover the requirements for transparency, not only at the time the Framework Agreement is established but at the award stage of call-offs.

Q.D5 Which of the award procedures do you operate, these being open, restricted or another procedure, to conduct the procurement of Framework Agreements and have the new Regulations changed your selection of procedure?

Responses from procuring entities

Four of the participants in this category stated that to conduct the procurement of Framework Agreements they only operate the Open Procedure. Participant PE01 said that “*we mainly operate the Open Procedure but for the procurement of certain Framework Agreements we mainly use the Restricted Procedure*”.

Eight other participants all said that they use the Restricted Procedure in the procurement of Framework Agreements. Participant PE07 confirmed that they use both the Open and Restricted Procedures as required to suit the procurement. PE13 said “*we are investigating*

whether to operate the Innovative Partnership procedure for a particular Framework Agreement”,

All the participants in this category confirmed that the new rules have not changed their selection of the procedure to be operated to conduct the procurement of Framework Agreements.

Responses from consultants and legal advisers

Five of the participants in this category who are consultants stated that to conduct the procurement of Framework Agreements they only operate the Open Procedure. Participant CL04 confirmed that they only use the Restricted Procedure.

Participants CL05, CL09 and CL10 who are consultants stated they use both the Open and Restricted Procedures in the procurement of Framework Agreements.

All the participants who are consultants confirmed that the choice of the procedure to be used is often proposed by their clients on whose behalf they are undertaking and managing the procurement process for Framework Agreements. They also confirmed that the new rules have not changed their selection of the procedure to be operated or the advice they give to their clients on the award procedure to be used in conducting the procurement of Framework Agreements.

All the legal advisers in this category confirmed that they have not been instructed by clients to advise on the selection of procedure to be operated to conduct the procurement of Framework Agreements.

Analysis

The decision concerning which procedure to use is a critical and strategic one which affects the whole procurement process.⁵⁹¹ In practice this decision is made with a structure of justification at the planning stage of the procurement process.

⁵⁹¹ European Commission, Public Procurement Guidance for Practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds, Publications Office of the European Union, 2015 p17

There are several options for the procedures which could be used, these being:

(1) Open Procedure:⁵⁹² This is a procedure where all suppliers interested in the procurement of a contract and who have responded to an advertisement can submit tenders. All tenderers must be considered without any prior selection process. The selection and the evaluation are undertaken after the submission of the tenders.

(2) Restricted Procedure:⁵⁹³ This is a two-stage procedure where only the suppliers who have been invited may submit tenders. The selection and shortlisting are usually undertaken in the UK on the basis within the Public Contracts Regulations 2015 by a Selection Questionnaire. These Regulations and the Directive 2014/24/EU sets a maximum for the number of candidates although a contracting authority may impose a limit for a given procurement.

Both the Open or the Restricted are the usual methods of procurement for works, services and supplies of a routine nature. Of the two procedures the Open Procedure is mostly used and in some Guidance Notes⁵⁹⁴ contracting authorities are encouraged to use the Open Procedure as much as possible rather than the Restricted Procedure. This is said so as not to limit the applications from smaller firms and suppliers.

The main advantage of the Open Procedure is that it can be highly competitive due to the unlimited number of tenderers. The disadvantages of this procedure are that it can be resource intensive for a contracting authority and the tenderers and the process can take a long time as all the compliant tenders must be examined.

The advantage of the Restricted Procedure is that it is less resource intensive for evaluation purposes due to the limited number of tenders to review. The disadvantage is there is less competition than the Open Procedure and is more difficult to operate due to the high requirements for transparency.

⁵⁹² Article 27 of Directive 2014/25/EU (Regulation 27 of the PCR 2015)

⁵⁹³ Article 28 of Directive 2014/25/EU (Regulation 28 of the PCR 2015)

⁵⁹⁴ Welsh Government, 'Framework Agreements : Procurement Advice Note (PAN)' [2017] Welsh Public Sector 26

The minimum time limits for all the procedures has been reduced.⁵⁹⁵ Contracting authorities are obliged to take the complexity of a contract being procured into consideration together with the time required to prepare tenders under the selected procedure.⁵⁹⁶

Nine of the participants from both categories stated that they operate the Open Procedure to conduct the procurement of Framework Agreements. Also, a further nine participants from both categories stated that they operate the Restricted Procedure. Other participants stated they operate both Open and Restricted Procedures as required by the procurement or in the case of a number of Consultants following instructions from their clients. One of the participants stated that they were investigating the use of the Innovation Partnership⁵⁹⁷ procedure for a particular Framework Agreement but did not provide any further information.

All the participants who undertook procurement stated that the new rules have not changed their selection of the procedure to conduct the procurement of a Framework Agreements.

Q.D6 How do you now notify members on a Framework Agreement of the results of direct selection or mini competition?

Responses from procuring entities

Participants PE02, PE12 and PE13 stated that they procure the Framework Agreements and then leave the Call-offs to the contracting authority using their Framework Agreements. They further stated that the involvement of suppliers from the Framework Agreement whether a Call-off is awarded through direct award or based on a mini-competition will therefore be made by the contracting authority. Accordingly, any formal notification, the operation of any standstill period for a call-off or the subsequent publishing of an award on 'Contracts Finder'⁵⁹⁸ where required will therefore be left entirely to that contracting

⁵⁹⁵ Articles 26 to 32 of Directive 2014/24/EU (Regulations 26 to 32 of the PCR 2015). These minimum time limits less the net amount of various adjustments available reflect the time periods and reductions available under Article XI of the revised WTO Government Procurement Agreement

⁵⁹⁶ Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015) 10

⁵⁹⁷ Article 31 of Directive 2014/24/EU (Regulation 31 of the PCR 2015)

⁵⁹⁸ Contracts Finder is a web-based portal provided for the purposes of Part 4 of PCR 2015 by or on behalf of the Cabinet Office.

authority. The Framework Agreement owner is therefore only informed of details of the supplier awarded the contract for each Call-off.

Participant PE09 said *“we only operate single provider Framework Agreements and so the notification and publication on Contracts Finder of an award of a call-off contract is left to the contracting authority using the Framework Agreement”*.

Eight of the participants stated that in relation to Call-offs from their Framework Agreements they did not notify other suppliers on the Framework Agreement where there is direct selection, do not operate a standstill period for the award of a contract following mini-competition or publish the award following a Call-off from the Framework Agreement on Contracts Finder.

Participant PE05 said that *“we do not operate a standstill period following an award of a contract from a Framework Agreement but do publish details of the award and the call-off on Contracts Finder”*. Participant PE10 also confirmed that they do not operate a standstill period for mini-competition but as all Call-offs from the Framework Agreements are run through their e-procurement portal which automatically issues a publication notice to Contracts Finder with details of the award of a contract following a mini-competition.

None of the participants said they would expect to publish on Contracts Finder details of contracts awarded following Call-offs from a Framework Agreement where the direct selection has been operated.

Responses from consultants and legal advisers

Participants CL05 and CL06 operate a standstill period for the award of contracts from mini-competition from Framework Agreements but as Call-offs are run through their e-portals there is automatic publication of details of the award of the contract on Contracts Finder.

Four of the participants who are consultants stated that they only procure and establish Framework Agreements on behalf of their clients, the Call-offs from the Framework Agreements being left to their clients and the operation and method of awarding contracts by either direct award or mini-competition being the decision of the contracting authority

involved. They would therefore expect the contracting authority to decide whether a standstill period is required and the award of the contract published on Contracts Finder.

Participant CL01 stated they do not operate a standstill period for the award of contracts following mini competition but do publish details of the contract award on Contracts Finder. Participant CL03 does not apply a standstill period for the award of contracts following mini competition but does publish the award of the contract on Contracts Finder.

Participant CL02 said *“there is no requirement to publish details of an award of a Call-off contract following the direct selection procedure or to have a standstill period for the award of a contract either under direct selection or mini-competition. They have followed this procedure of not having a standstill period and have never been challenged”*. This participant also confirmed that they do not publish on Contracts Finder the award of contracts following a mini competition.

When questioned none of the participants who are consultants stated that they would expect to publish on Contracts Finder details of contracts awarded following Call-offs from a Framework Agreement where direct selection had been operated.

One of the participants who are legal advisers confirmed that they have advised clients on several occasions on the operation of call-off methods from Framework Agreements. The other three participants in this category who are legal advisers stated that they had not advised clients at the procurement stage in relation to the methods of call-offs from Framework Agreements.

Analysis

The basis, structure and methodology for the specific notification of suppliers following a Call-off from a Framework Agreement should be set out in the Framework Agreement and follow the principles of transparency. The procedure to be operated at the Award Stage should cover the notification of a supplier from a single supplier/provider Framework Agreement or the suppliers appointed to a multi supplier/provider Framework.

The basis of notification requires to be clearly defined as many Framework Agreements can be operated by other contracting authorities in addition to the contracting authority who originally procured the Framework Agreement. In this regard several Framework Agreements procured by Central Purchasing Bodies⁵⁹⁹ contain specific requirements to be kept informed of the results and notifications of Awards made by way of a Call-off from their Framework Agreements.

It is however unclear how legislation covers the treatment of Call-offs from a Framework Agreement as to whether a contracting authority must give reasons to those suppliers who have submitted a mini-tender in a particular Call-off but been rejected and giving them the name of the winner.⁶⁰⁰ Some Framework Agreements however confirm in Annexes the information that will be published following the Award Procedure.

As well as formal notification of the Award to suppliers resulting from a Call-off, there are other obligations to be considered by a contracting authority, these being to comply with advertising requirements in the UK set out in Regulation 108 of the PCR 2015 and covered in CCS Guidance.⁶⁰¹ There is however nothing specifically stated in the PCR 2015 on the publication of contracts awarded under a Framework Agreement. This view is supported in a guidance on transparency⁶⁰² which states that information should also be published in relation to contracts from a Framework Agreement which can be as a result of mini competition. Details of all the contracts above the relevant thresholds should be published.⁶⁰³

Under Article 55(1) of Directive 2014/24/EU and Regulations 55 and 87 of the PCR 2015 the provisions for a Standstill period is covered before a Contract can be entered into or Framework Agreement can be concluded. In relation to above threshold call-off contracts from a Framework Agreement the standstill period does not have to be considered. Whilst the obligation for a standstill period is not mandatory for call-off contracts from a Framework Agreement it is however good practice to also apply a standstill period on a voluntary basis.

⁵⁹⁹ Article 37 of the Directive 2014/24/EU (Regulation 37 of the PCR 2015)

⁶⁰⁰ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* (3rd edn, 2 Sweet & Maxwell 2018) 561

⁶⁰¹ Crown Commercial Service, Procurement Policy Note 07/16 : Legal requirements to publish on Contracts Finder, S7 - Publishing contract award

⁶⁰² Crown Commercial Service, Guidance on the new transparency requirements for publishing on Contracts Finder, S5 – Minimum data requirements for publication, March 2015

⁶⁰³ Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* (3rd edn, 2 Sweet & Maxwell 2018) 1234

This would then protect a contracting authority in the UK from a claim of ineffectiveness brought under Regulation 99(6) of the PCR 2015.

If a court declares the call-off contract ‘ineffective’, performance of the contract must cease from that date. The contracting authority would then be required to pay a fine and the court may also order it to pay compensation to the claimant. Therefore, by applying a standstill period to call-off contracts, the authority calling off is protected from such claims. Provided no challenge emerges during the standstill period, suppliers are prevented from being able to claim for the remedy of ineffectiveness on the grounds that the mini-competition rules were not properly followed.

In the rules under Article 50(2) of Directive 2014/24/EU and Regulation 50(4) of PCR 2015 contracting authorities are not bound to send a notice of the results of the procurement procedure for each contract based on such an agreement. One commentator has said that there should have been an obligation to publish to fill an important gap in the current transparency regime for frameworks. Whilst contracting authorities are not bound to publish, this has been overridden in the UK by requirements set out in the CCS Guidance to which I refer earlier in this section.

Several participants stated that they only procure the Framework Agreements and leave the call-offs to the contracting authorities using their Frameworks. No reference was made to how the provisions in their Framework Agreements to this situation were provided.

Some participants stated in relation to call-offs from their Framework Agreements they did not notify other suppliers where there is a direct selection process operated. They further confirmed that they did not operate a standstill period or publish the award on Contracts Finder.

All the participants stated that they would not publish on Contracts Finder details of contracts awarded where direct selection had been operated. One of the participants confirmed that they had never operated a standstill period and have not been challenged.

A number of participants confirmed that they did publish Call-offs for above threshold contracts awarded on Contracts Finder, but other participants did not publish these contracts on Contracts Finder.

The responses from participants confirm my findings in practice that there are questions of transparency at the award stage of call-offs and also the provisions within a Framework Agreement to cover the award stage which is then left to the user of a Framework Agreement. The lack of awareness of all the requirements relating to publishing awards at call-off stage shown in the responses only supports my findings in practice. Further training could be provided to understand the regulatory provisions on Framework Agreements and call-off procedures. None of the participants stated that the changes to the rules relating to the procedures for call-offs had simplified the use of the rules in practice.

Summary and overview of this Section D

This Section (Framework Agreements) contains six questions which were drafted as there had been changes to the rules in this topic area. Under Article 33 of Directive 2014/24/EU and Regulation 33 of PCR 2015, the aim of these changes was to improve the system of Framework Agreements and Call-offs from the Framework and the availability of two procurement methods especially in multi-provider and direct award procedures. Responses from participants in both categories found that the changes to the rules had not simplified the use of Framework Agreements.

The changes in the rules on types of Framework Agreements were said by participants of both categories to be understood but in practice they had not changed their choice of type of Framework Agreement. Participants stated that the requirement of notification of suppliers and publication of awards from a Call-off were not followed and relied on their previous practices. This raised questions of transparency and further a lack of the application of the new rules in practice.

The selection of the appropriate Framework Agreement for a particular contract or sector is important for contracting authorities but the responses of participants indicated that many of the participants were unclear on the rules and understanding of the provisions in the rules.

Participants were further unaware of the hybrid system for the Call-off procedure now available and the regulation required for Call-offs from a Framework Agreement.

Participants from both categories found that in practice the changes in the rules had not simplified the use of Framework Agreements and some noted that the changes in the rules did not assist and made the rules in practice more complex.

An important area of the objective selection criteria of Framework Agreements or Call-offs operated by respondents had not changed.

The approach of the participants in the awarding of Call-offs from a Framework Agreement due to limited regulation and controls provided a basis of a non-structured approach and so the new rules in this area had not improved the approach taken by the participants.

Although there is in some literature on the law of Framework Agreements, the findings of this research with regard to the operation of Framework Agreements and Call-offs in practice has not been provided and indicates that there is a lack of awareness and understanding with many respondents relying on previous experience in practice under earlier rules, these rules being repealed by Directive 2014/24/EU and PCR 2015.

5.2.5 Section E Abnormally Low Tenders

Q.E1 Have the changes in the rules on Abnormally Low Tenders which are there to simplify the position of the Contracting Authority, made your obligations and the action to be taken more clear when seeking an explanation on any Tender which you consider appears abnormally low?

Responses from procuring entities

Ten of the participants in this category all agreed that the new rules have made their obligations and the action to be taken clearer but did not confirm whether the new rules had simplified their position. Participants PE01 and PE08 stated that they have not had recourse to operating the new rules in relation to abnormally low tenders. PE02, PE04 and PE05 all stated that they have revised or amended their own procedures to also cover due diligence when seeking explanations from tenderers on tenders which appear to be abnormally low.

Participants PE03, PE07 and PE12 stated that they did not consider the changes have made seeking an explanation from a Tenderer clearer. Participant PE13 said *“there was no further clarity due to the lack of definition of ‘abnormally low’ which presents a problem in that the changes have not clarified what constitutes abnormal”*.

Responses from consultants and legal advisers

Seven of the participants who are consultants in this category all agreed that the new rules have made their obligations and the action to be taken clearer but did not confirm that the rules simplified the position of contracting authorities. Participants CL07 and CL10 stated that they consider the action was not clear with participant CL02 agreeing with this point and further stating that the problem is there is no definition of ‘abnormally low’.

The four participants who are legal advisers in this category all stated that they had been asked to advise on the action relation to abnormally low tenders and confirmed that the lack of a definition of ‘abnormally low’ or what constitutes abnormally low has not assisted the situation for contracting authorities.

Analysis

Within EU public procurement the concept of abnormally low tenders has long been recognised as having a significant role. As long ago as 1971 under Article 29 of Directive 71/305/EEC⁶⁰⁴ abnormally low tenders were covered.⁶⁰⁵

Contracting authorities have two main considerations in relation to abnormally low tenders, these being what if a bid is so low priced that it could ultimately lead to higher costs and/or performance and delivery issues either initially or over the duration of the contract or alternatively a challenge could be brought if the contract is awarded to a tenderer who is thought to have submitted an abnormally low price for the contract.

Case law⁶⁰⁶ on abnormally low tenders under earlier EU Procurement Directives focused on several areas such as the need to investigate individual situations and not to automatically eliminate a tender which appears to be considered as being abnormally low. In the case of *Slovensko*⁶⁰⁷ the CJEU found that there is an obligation on the part of a contracting authority to investigate abnormally low tenders even when they did not propose to reject them.

The provisions relating to abnormally low tenders is dealt within by Article 69 of Directive 2014/24/EU.⁶⁰⁸ Recital 103 of Directive 2014/24/EU also relates to abnormally low tenders. In the UK Regulation 69 of the PCR 2015⁶⁰⁹ covers the provisions for Abnormally Low Tenders.

It has been said that the provisions on abnormally low tenders have undergone significant changes in Directive 2014/24/EU and these changes have been described as a revitalisation of

⁶⁰⁴ Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.

⁶⁰⁵ Abby Semple, *A practical guide to public procurement* (OUP 2015) 116

⁶⁰⁶ Case 76/81 *Transporante et Travaux SA v Minister of Public Works* [1982] E.C.R. 417, Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] E.C.R. 1839, Case C-295/89 *Impresa Donà Alfonso Directive Dona Alfonso et Figli s.n.c. v Consorzio per lo sviluppo Industriale del Comune di Monafalcone* [1991] E.C.R. 1-02967 and the Joined Cases C-147/06 and C-148/06 *SECAP and Santorso v Comune di Torino and Santorso Socooparl v Comune di Torino ("SECAP")* [2008] E.C.R. 1-3565

⁶⁰⁷ Case C-599/10 *SAG ELV Slovensko v Urad preverejne obstaravanje* – Judgement of 29 March 2012.

⁶⁰⁸ Directive 2014/24/EU of the European Parliament and Council of the 26 February 2014 on public procurement and replacing Directive 2004/18/EC.

⁶⁰⁹ Statutory Instrument 2015 No. 102 – Public Procurements.

the provisions.⁶¹⁰ One of the changes is covered in Article 69(1) of Directive 2014/24/EU and Regulation 69(1) of PCR 2015 which states that contracting authorities shall require economic operators (tenderers) to explain the price or costs proposal in a tender where the tender appears to be abnormally low in relation to the works, supplies or services. This obligation writes into the legislation the statement in *Slovensko*⁶¹¹ the duty to investigate an abnormally low tender.

There is not however any definition or example of what might be considered by a contracting authority as an abnormally low tender. The handling of abnormally low tenders had been identified in the consultations on the 2011 Green Paper as one of the problem areas for Member States.⁶¹² In the Commission's original proposals a formula was submitted. With the average price or cut off being used, this being qualified as being applied where at least five tenders had been submitted. The formula did not cover the situation where less than five tenders were submitted. There was however an obligation to request explanations where tenders appeared to be abnormally low for other reasons. These proposals were removed in later drafts of the Directives and therefore do not appear in the Directive 2014/24/EU.

Once an investigation of an abnormally low tender is undertaken the contracting authority must take into consideration the explanations given by the tenderer. In practice a tenderer should be requested to address all the contracting authority's concerns and only give consideration and assessment to the responses as required by Article 69(3) of Directive 2014/24/EU and Regulation 69(3) of the PCR 2015 and decide whether or not to reject the tender because the answers do not satisfactorily account for the low level of prices or costs proposed by the tenderer. In Article 69(2) of Directive 2014/24/EU and Regulation 69(2) of the PCR 2015 there is a list of factors which a contracting authority must take into consideration.

Many of the participants agreed that the new rules have made their obligations and the action to be taken clearer with some participants seeking to amend or revise their procedures. None

⁶¹⁰ Grith Skovgaard Ølykke and Albert Sanchez-Graells, *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing Ltd. 2016) 146

⁶¹¹ Case C-599/10 SAG ELV Slovensko v Urad preverejnih obstaravanj – Judgement of 29 March 2012.

⁶¹² European Commission, European Commission Staff Working Paper, Evaluation Report : Impact and Effectiveness of EU Public Procurement legislation 27 June 2011 SEC (2011) 853 final.

of the participants provided information on their procedures or referred to the rules in relation to abnormally low tenders.

Several participants in both categories stated that there is no clear definition of ‘abnormally low tenders’ which causes problems and has not assisted contracting authorities.

Five of the participants stated that they considered the new rules have not made seeking explanations from tenderers clearer. One of the participants stated that they have not had recourse to operating the new rules.

This question was set to ascertain whether the changes in rules on abnormally low tenders which are there to simplify the position of the contracting authority have made the participants obligations clearer when seeking an explanation on a tender which it considers to be abnormally low. From the responses it would appear that the participants did not fully understand the changes or the action to be taken. Although training could remedy the lack of awareness, participants relied upon the fact that there is no clear definition of an abnormally low tender in the rules, accordingly, they decide on the action to be taken in seeking an explanation on an abnormally low tender

Q.E2 Within the Tender documents you prepare is there a clear reference to confirm that the authority may investigate and ultimately reject any Tender it may consider to be abnormally low? Was this reference included in Tender Documents before the new rules, if so, has the content of such a reference been made clearer?

Responses to procuring entities

Eight of the participants in this category confirmed that they all have a clear reference in their tender documents to confirm that as a contracting authority they may investigate and ultimately reject any tender it may consider to be abnormally low. Except for participants PE04 and PE11 in this group they all had a form of reference to investigate an abnormally

low tender before the new rules. Participant PE07 said “*we now have specific procedures as a result of the changes*”.

Participants PE05, PE08 and PE13 stated that they only make a reference to Regulation 69⁶¹³ in their Tender Documents but no other explanation. These participants also stated they did not refer to abnormally low tenders in documents before the new rules. Participant PE14 stated they do not make any reference to abnormally low tenders in their Tender Documents and did not cover this subject in Tender Documents prior to the introduction of the new rules.

Responses from consultants and legal advisers

Eight of the participants in this category, all of whom are consultants, confirmed that they have in their procurement documents a clear reference to confirm that their clients, the contracting authorities, may investigate and ultimately reject any tender it may consider to be abnormally low. Participant CL07 also said “*we also cover extremely high tenders in our Tender Documents in accordance with instructions from our clients*”. Within this group all but participants CL02, CL07 and CL09 stated that they did not have reference to investigation of abnormally low tenders in Tender Documents before the introduction of the new rules. Participant CL10 said “*we make reference to Regulation 69 in the Tender Documents but no other requirement or explanation is provided in relation to abnormally low tenders*”.

All the legal advisers in this category stated that they had advised clients on the inclusion of statements on the investigation and ultimate rejection of tenders considered to be abnormally low and reference was again made to the lack of clarity on the definition of abnormally low.

⁶¹³ Article 69 of the Directive 2014/24/EU (Regulation 69 of the PCR 2015) – Abnormally Low Tenders

Analysis

The question was set as the provisions on abnormally low tenders have undergone some significant changes. Article 69 of Directive 2014/24/EU and Regulation 69 of the PCR 2015 provides the circumstances in which a contracting authority is obliged to investigate a tender which appears to be abnormally low. It is clear that there is an obligation to investigate even if the contracting authority is planning to accept a tender. The Article and the Regulation further provide that a tender may only be rejected where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

For transparency a contracting authority should make specific reference to Regulation 69 of PCR 2015 in the Tender Documents and further that a contracting authority may investigate and ultimately reject a tender it considers to be abnormally low. In addition reference should be made to a change in the provisions whereby it is the explicit duty of a contracting authority to reject a tender where it has been established that the tender is abnormally low because it does not comply with the applicable obligations referred to in Article 18(2) of Directive 2014/24/EU which covers environmental, social or labour law. This obligation is covered in Article 69(3) of Directive 2014/24/EU. The mandatory rejection of a tender upon these grounds are also referred to in Recital 103 of Directive 2014/24/EU.

Regulation 69(5) of the PCR 2015 covers the obligation to reject a tender where it has been shown that the tender is abnormally low because it does not comply with environmental, social or labour law and makes reference to the applicable obligations set out in Regulation 56(2) of PCR 2015. This Regulation in the PCR 2015 is in the sub-section covering the 'General principles in awarding contracts' and lists the obligations which has to be reviewed as Regulation 56(2) provides for a contracting authority to decide not to award in respect of the stated obligations whereas Regulation 69(5) of the PCR 2015 covers the action of rejection of a tender.

Sixteen of the participants across both categories confirmed that they have in their procurement documents a clear reference that a contracting authority may investigate and ultimately reject any tender considered to be abnormally low. Three of the participants only refer to Regulation 69 of the PCR 2015 in their Tender Documents but provide no other explanation in support.

Many of the participants had reference to abnormally low tenders in the Tender Documents before the new rules, however others confirmed they did not previously refer to abnormally low tenders in the Tender Documents before the introduction of the new rules.

Although the PCR 2015 and Directive 2014/24/EU do not offer guidance on whether a price is or is not ‘abnormally low’, in the current market tenderers should be made aware in the Tender Documents.

This question was seeking to obtain how the participants understood and applied the new rules, in particular the processes they follow and set out in their tender documents and how a contracting authority can investigate and examine a tender where it appears to be abnormally low. In addition, if evidence is supplied by the tenderer but does not satisfactorily account for the abnormally low level of price or costs, even after taking into consideration any explanation a tenderer may provide, the contracting authority may still decide a tender must be rejected. From the responses, the participants showed that they did not fully understand the new rules and action required on whether the new rules had made the actions required from contracting authorities clearer.

Q.E3 Has your organisation a clear and objective basis in place for internal decisions to treat a Tender as abnormally low such as a trigger point for the investigation of a Tender considered as abnormally low? Is there any difference depending on whether a Tender is for works, services or supplies?

Responses from procuring entities

Eight participants in this category stated that their organisations had a clear and objective basis in place for internal decisions to treat a tender as abnormally low, however this did not involve a trigger point. No information on the basis was provided. Participant PE12 also confirmed that they had a clear and objective process in place which incorporated a trigger point system. All these participants confirmed that the same process was operated for works, services and supplies.

Participants PE04, PE08, PE10 and PE11 confirmed that they do not have any process for internal discussions to treat a tender as abnormally low. Participant PE13 said “*we did not have any processes in place as the nature of Framework procurement and tendering made it difficult to impose a clear and objective set of criteria and we therefore take each case on merit*”.

Responses from consultants and legal advisers

Eight participants who are consultants in this category all confirmed that they had a clear and objective basis in place for internal discussions to treat a tender as abnormally low. No information was provided in relation to the objective basis in place. Two of this group of participants stated that their process involved a trigger point system. All these participants also confirmed that their systems cover works, services and supplies.

Participants CL10 and CL11 stated that they did not have any process or trigger points but discussed any case with their clients.

One of the legal adviser participants had advised on a process to be used for internal discussion within an organisation in relation to investigations into abnormally low tenders but the other three legal advisers had not been instructed to advise.

Analysis

The basis of this question was to ascertain whether due to the changes in the rules the participants had a clear and objective basis in place for internal decisions when a tender is considered abnormally low.

The absence of an EU definition of abnormally low tenders raises several problems to a contracting authority if it considers a tender as being abnormally low as it then has an obligation to investigate the matter. There is no explanation of a trigger point at which the contracting authority should require the tenderer to explain its tender. In addition, the word ‘appears’ does however leave room for manoeuvre and allows the contracting authority to seek an explanation without first rejecting the bid and then requesting an explanation later.

This could suggest that a contracting authority needs in the first stage to carry out a *prima facie* assessment of the abnormally low character of a tender.

In practice a contracting authority may consider the tender under review against other bids received or may have its own objective standard which could be market value although this methodology is difficult to ascertain in the case of complex projects. A contracting authority may need to obtain external evidence to decide value although this may be difficult to justify. In some cases the trigger point may be an upfront ‘yardstick’ for abnormally low tenders which could relate to budgets set out in the procurement documents, however there is always the danger in making and setting an estimate early in the process.

There is nothing that prevents the contracting authority from making a comparison of tenders with estimated budgets in tender specifications and from identifying one of the tenders as being abnormally low where the amount of that tender is considerably lower than the estimate. In this regard The General Court of the Court of Justice in the European Union found that the abnormally low nature of a tender was identified by comparing the amount of that tender to the actual maximum budget set out in specifications. The General Court noted that nothing prevents a contracting authority from comparing tenders with an estimated budget set out in the tender specification. The decision was that the tender was abnormally low if the amount of that tender is considerably lower than the estimate budget.⁶¹⁴

A number of the participants stated that their organisations had a clear and objective basis for internal decisions to treat a tender as abnormally low with some participants having trigger points. Two participants who are consultants stated that they did not have any process or trigger points but discussed cases with their clients. One participant stated they did not have a clear and objective process in place as they only procured frameworks and so considered every case on its merits.

Those participants who confirmed that where they had a clear and objective process in place, they applied it to any contract whether for works, services or supplies.

⁶¹⁴ Case C-401/09 P.Evropaiki Dynamiki-Proigmena Systimata Tilepikoinonion Pliroforikis Kai Tilematikis AE v European Central Bank [2011] 3 C.M.L.R. 24 CJ

Q.E4 Does your organisation maintain and then retain a clear audit trail of all evaluation and investigation considerations and clarifications? If so, have the new rules changed your audit procedure and if so, what areas are different?

Responses from procuring entities

Thirteen participants in this category confirmed that they have in place a clear audit trail for the evaluation, investigation and clarifications sought together with provisions for the retention and maintenance of all information relating to abnormally low tenders. In this group participants PE03, PE04 and PE10 also stated that all their information was held on their e-procurement portal. Participant PE12 said *“our audit procedure is based on a series of process templates for each procurement”*. Participant PE13 said *“we have a separate electronic system in place but it has never been implemented”*.

All the participants in this category confirmed that the new rules had not changed their audit procedures.

Responses from consultants and legal advisers

Nine of the participants in this category confirmed that they maintain and retain a process for a clear audit trail of all evaluation and investigations into abnormally low tenders. Within this group participants CL03, CL05 and CL09 stated that the information in the process they operate is contained within their e-procurement portal. Participant CL04 also stated that their audit process is part of their Quality Assurance programme. All nine of the participants confirmed that the new rules had not changed their audit procedures.

All the participants who are consultants were asked about the requirements for a contracting authority to draw up written reports on contracts or framework agreements in accordance with Regulation 84⁶¹⁵ which contains the reasons for a rejection of a tender found to be abnormally low. One participant stated they were not aware of Regulation 84 and several the

⁶¹⁵ Article 84 of Directive 2014/24/EU (Regulation 84 of the PCR 2015) – Reporting and documentation requirements – Individual reports

others confirmed that their processes would allow for the information to be provided to their clients for them to prepare reports.

All the legal advisers in this category confirmed that they have advised generally on Regulation 84 and one stated that they had drafted templates for clients covering not only the requirements on information on abnormally low tenders but also the general principles of this Regulation.

Analysis

The basis of this question was to ascertain whether participants had in place for management and review purposes a process to maintain and retain a clear audit trail of all actions and investigation taken in relation to abnormally low tenders due to the changes in Article 69(1) of Directive 2014/24/EU and Regulation 69(1) of the PCR 2015.

The procedures set in place by contracting authorities in relation to the information on abnormally low tenders would then be available for inclusion in individual reports on proceedings for the award of contracts. The requirement in Article 84(1)(c) of Directive 2014/24/EU and Regulation 84(1)(c) of the PCR 2015 to include where applicable the reasons for the rejection of tenders found to be abnormally low. In addition, Regulation 84(7) of the PCR 2015 requires contracting authorities to document the progress of all procurement procedures whether or not they are considered by electronic means.

Most of the participants across both categories confirmed that they had a clear audit trail for the processes and action taken in relation to tenders found to be abnormally low. None of the participants provided any information on the content of the audit processes they have in place or the actions to test and verify that the processes meet the required objectives.

With the possibility of challenges in the current marketplace and increased levels of competition there is a requirement to investigate tenders which appear to be abnormally low, the keeping of records and an audit procedure is paramount.

Although there are changes to the rules on abnormally low tenders, all the participants confirmed that they have not changed their audit procedure in relation to abnormally low tenders.

The structure of the provision of information so that contracting authorities can meet their obligations under Regulation 84(1)(c) of the PCR 2015 were covered by most participants with only one participant being unaware of this Regulation. The legal adviser participants confirmed that they had advised clients on Regulation 84 of PCR 2015 which covers reporting and documentation requirements in relation to the areas for rejection of tenders found to be abnormally low.

Summary and overview of this Section E

This Section E (Abnormally Low Tenders) contains four questions as this topic has for a long time been recognised as playing a significant role in the public procurement process. The provisions relating to abnormally low tenders is covered by Article 69 and Recital 103 of Directive 2014/24/EU and in the UK Regulation 69 of PCR 2015.

There is reference in literature on the law on abnormally low tenders but none on the application in practice. The first question was set to ascertain whether the changes in the rules had made participant's obligations clearer in practice, however the responses showed that the participants did not fully understand or were aware of the changes. The second question enquired as to their knowledge on the investigation and rejection of a tender that may be considered as abnormally low. Again, with respect to this question, the participants showed that they did not understand the new rules and the action required which was intended to make actions on the part of contracting authorities simpler.

The last two question covered procedures required by the rules. Again, participants from both categories had mixed and contrary views on the action to be taken in practice or in fact whether they had changed their procedures to take in the new rules. In relation to audit procedures, all participants from both categories confirmed that they had not changed any procedures or improved their approach to meet their obligations under the new rules although there was generally a recognition of the requirements of Regulation 84(1)(c) of PCR 2015.

Overall, the responses indicated that many of the respondents from both categories did not understand the changes in the rules or the action to be taken in compliance of the rules but stated that the rules did not clarify what constitutes abnormally low when reviewing tenders.

5.2.6 Section F Concluding Question

Q.F1 What is your overall view and assessment of whether the changes in the rules have simplified and made more flexible in relation to the four topics covered, these being selection criteria, contract award criteria, framework agreements and abnormally low tenders?

Responses from procuring entities

Participant PE01 said *“In undertaking the day to day procedures it does not feel that in relation to the four topics covered they have not been made more flexible”*.

Participant PE02 stated that in relation to Framework Agreements it took their organisation some time to review all the changes before they could be operated. This resulted in a better guide on use rather than making the rules more flexible. In relation to the Selection Criteria they found the information easier to operate rather than more flexible. Regarding Contract Award Criteria and Abnormally Low Tenders they had not found in practice the new rules made these areas more flexible.

Participant PE03 said *“the changes to the rules in any of the topic areas have not made their use more flexible or in fact easier to deal with in practice”*.

Participant PE04 said *“although having changes to modernise the rules is a positive thing and they have provided us with some clarity overall but in practice in the topic areas the new rules have not made the operation more flexible”*.

PE05 said “they have found the new rules in the subject areas have made their use more flexible. The changes have led in their case to a more intelligent client as you have to work with them and prepare procedures”.

Participants PE06 and PE07 stated that there are several other changes which have been useful in the procurement process but the changes to the four topic areas have not made their use in practice either simpler or more flexible.

PE08 stated that apart from some changes in the rules on time periods for the various procedures, the changes in the rules in relation to the four specific topics they consider they have not made the use in practice either simpler or more flexible.

Participant PE09 stated there are some areas within the Selection Criteria topic that have made procurement in practice more flexible but in relation to the other topics the answer is 'no'.

PE10 said *"the changes to the rules in the topic areas are positive and have made some of the processes more flexible but they could be improved to result in them being more flexible in practice"*.

PE11 said *"my overall assessment is that I do not think that the changes to the rules in respect of the subject topic areas have given us more flexibility, an example being at Selection Stage where the introduction of the mandated CCS Selection Questionnaire or PAS91 has prevented flexibility in the procurement process"*.

Participant PE12 said *"overall in the four topic areas the new rules have made the operation of these more flexible and it has highlighted people's awareness of these areas"*.

Participants PE13 and PE14 both stated that in practice none of the changes in the four topic areas have either simplified the procurement process or made it more flexible.

Responses from consultants and legal advisers

Seven of the participants in this category confirmed that regarding the four topic areas the rules had not been simplified or made more flexible. In this group participant CL02 added that the changes did not go far enough and two of the participants stated the rules on Abnormally Low Tenders could have been made clearer to provide more flexibility.

Participant CL07 said that *"we have found the changes in the four topic areas have not made a massive difference in practice and certainly do not appear to have made these areas more flexible"*. Participant CL10 considered that in the four topic areas the changes have not made the rules flexible but in fact they have been made more complex.

Two of the legal adviser participants both stated they considered the rules in the subject topic areas have been made more flexible although they still advise on abnormally low tenders and Framework Agreements as often clients require clarification on these areas.

Another legal adviser said, *“there is no real change in the topic areas and the modernisation has to be queried as they are still providing advice to clients on all the topic areas”*. The remaining legal adviser participant stated that *“in relation to Selection Criteria the rules have not made this area more flexible but in the area of Framework Agreements the rules have been made more flexible whereas in the other two topic areas the rules have not been simplified.*

Analysis

This concluding question was set to allow participants to provide an overall assessment of the four topic themes contained within Section B to E inclusive of the Interview Guide which are Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders.

Only a few of the participants considered the changes to the rules in the topic areas had in fact simplified the procurement process.

The responses from many of the participants in both categories found that the changes to the rules covering all the subject areas had been made the operation of these themes more flexible whilst others stated that the changes to the rules had only made some of the topics more flexible. This view however was not upheld by a number of the participants in both categories who confirmed that the changes to the rules in the four topic areas had not been made more flexible. One participant stated the changes made to the rules in the topic areas are positive, but they could be further improved to be more flexible in practice.

Summary and overview of this Section F

This Section F contains a Conclusion Question which was designed to allow participants to provide an overall assessment of the four topic areas which were covered within Sections B

to E of the Interview Guide. These areas are Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders. The question required an overall view and assessment on whether the changes in the rules have simplified and made more flexible the topic areas in practice.

Only a small number of the responses from participants from both categories considered that the changes had simplified the public procurement process. Many of the responses from both categories found in practice that the operation of the four topic areas in the procurement process were more flexible, but some of the participants found that the changes in the rules had in practice made the process more complex.

The responses indicated that a few of the participants were aware of the new rules and the obligations but that the intricacies of the rules are either not understood or did not warrant any alteration to their procedures when operating the topic areas in the procurement process.

There is no literature relating to the topic areas covered by the research but the findings from the responses support my experience in practice that there is a lack of knowledge or understanding of the new rules.

Chapter 6 Conclusion

6.1 Introduction

The research in this thesis has taken some steps to examine and then understand how the rules in Directive 2014/24/EU have in practice been perceived, understood, interpreted and applied in practice in the public procurement process in the UK.

I have undertaken a black letter / doctrinal approach of the relevant laws in order to set out the past and present legal frameworks about my thesis. A black letter law methodology was followed as I needed to undertake a legal/textual analysis of the new rules to better understand how they compare and contrast with the old rules.

In undertaking an analysis of all the changes, modifications and reforms to the law from Directive 2014/24/EU and from my experience in practice when applied to the procurement process I selected a number of specific topics for my research. The topics selected were Selection Criteria, Contract Award Criteria, Framework Agreements and Abnormally Low Tenders. These topic areas were selected to provide an important and reasonable indication of the kinds of challenges the new rules give rise to in practice.

As black letter law methodologies do not record the application of the law in practice, I have followed an empirical interview methodology to capture the perceptions of experienced practitioners of public procurement. The investigation was undertaken using 27 participants and whilst this is not a large number and the findings are not generalisable to the larger community, these participants have a cumulative experience of over 1700 procurements and therefore have provided rare and invaluable insights into the process. The findings and my analysis are presented in Chapter 5.

In this chapter I will be providing an answer to the main research question together with supplementary questions set out in Chapter 1 by linking the findings from the interviews and my analysis with these questions.

This chapter is organised as follows; Section 2 sets out my finding linked to the research question and supplementary questions and Section 3 contains a conclusion and some suggestions for further study.

6.2 Research questions and supplementary questions to show how the new rules are operated by practitioners.

My research question is ‘Have the new procurement rules in Directive 2014/24/EU simplified and improved the public procurement process’.

In order to assist me to address the main research question I have focused on three supplementary questions which I will consider next. Towards the end of the chapter I will then revert to addressing the main research question and will provide some suggestions for further study.

6.2.1 Supplementary question 1 : Has the modernisation of the new rules simplified and made more flexible the procurement process in practice in the selected topic area.

Selection Criteria

As to simplification of the procurement process, only a small number of the participants agreed that simplification had been achieved. The introduction of the Crown Commercial Services’ Standard Selection Questionnaire and PAS91 as the use of these documents was mandatory was said by several participants to simplify the procurement process. There were mixed views amongst the participants on whether or not the Selection Questionnaire simplified matters. In relation to selection criteria, some participants agreed that some of the rules were useful when undertaking the procurement process, but this did not in practice make the process simpler.

Many of the participants found that the rules had made the operation of the procurement process more flexible but other participants stated that in relation to flexibility the rules had made the process more complex or not made their use easier in practice.

The responses from participants support my experience in practice that there is a lack of awareness and understanding by those undertaking the procurement process of the intricacies of the rules and their application.

Contract Award Criteria

In relation to simplification, several participants found that the new rules had simplified the procurement process but in the main, the aim of simplification in the important area of award criteria being presented in a straight forward and streamlined way had not been met.

None of the participants stated that the new rules had made the procurement process more flexible but some said that in certain areas the rules had highlighted user's awareness of contract award criteria.

The responses from participants confirm my experience in practice that in the important area of Contract Award Criteria there are different interpretations of the rules with many contracting authorities often following existing processes for selecting and applying Contract Award Criteria which they have not changed to meet the new rules as they suit a contracting authority's requirements. Where a few contracting authorities are aware of the new rules and their obligations, the intricacies of the rules are not always understood.

Framework Agreements

Participants found that the changes to the rules in this area had not in practice simplified the use of framework agreements.

Several participants found that the changes in the rules had made the use of framework agreements more flexible although others stated that the changes have not made a difference and have not made the use of framework agreements more flexible. Another group of participants found that the changes to the new rules did not go far enough to assist in the procurement process with a further comment that the changes have made the rules more complex.

I consider that the responses in this topic area, supported by my experience in practice, indicate that many of the participants lacked an understanding of the changes to the rules in practice and the obligations imposed and follow existing provisions previously in place.

Abnormally Low Tenders

A small number of participants considered that the changes in the rules have simplified the operation of abnormally low tenders in practice. Participants found that the changes did not go far enough to simplify the procedure for abnormally low tenders.

Many of the participants found that the changes to the rules had made the operation of this subject area more flexible. A point was made that the rules of abnormally low tenders could however have been made clearer and improved which in turn would then provide flexibility. Several participants stated that in practice they had found the rules in this area had not made the process more flexible.

The responses support my experience in practice that the changes to the rules in this topic area are not fully understood by many participants who often follow existing practices.

6.2.2 Supplementary question 2 : Have the procuring entities and consultants / legal advisers understood and applied the new rules in relation to the four subject topics areas.

Selection Criteria

In relation to the selection of the criteria for individual procurements, the participants followed either the standard CCS Selection Questionnaire or the Publicly Available Specification (PAS91). There was agreement by some participants that the use of these documents had simplified the selection stage, however it was also considered by some participants that the use of either of the two documents had made the selection stage more difficult and did not provide the flexibility that had been available in the past.

With regard to financial and economic criteria, from the responses it was found that there was a lack of awareness of the intricacies of the rules. There were several participants who followed their own systems whether or not their procedures fully complied with the rules. There is a need for training in the understanding of the rules and the application of the new rules in practice.

Upon the matter of verification of economic operators at the selection stage, there was no consensus on the part of the participants on evaluation at this fundamental selection stage.

Some information was put forward by participants but generally no details of any systems that were applied were put forward. Although some reference was made to the CCS Selection Questionnaire and PAS91, the responses raise questions both on the understanding of the rules with its impact on application of the rules. Although some guidance is provided by the CCS, more training in this area is needed.

As to the changes in the methodology of the selection criteria under the Open and Restricted Procedures, participants did not give any information on any changes that had been made as a result of the new rules. From responses provided there is again a lack of understanding on the part of participants of the requirements in the rules when undertaking procurements.

In relation to changes in the rules on conflicts of interest at selection stage, although there was some awareness of the application of the rules and the action to be taken, generally the obligations were not followed by participants.

Contract Award Criteria

As to whether the changes in the rules on contract award criteria have enhanced the participants understanding of the definition of the most economically advantageous tender (MEAT), most participants confirmed that the changes had not enhanced their understanding. None of the participants referred to the requirement for award criteria in the new rules to be linked to the subject matter of the contract.

In response to whether the selection assessment and evaluation of award criteria is more difficult under the new rules, many the participants stated that they had not changed or made only minor adjustments to their approach. None of the participants referred to the requirements for contract award criteria together with weightings and sub-criteria to be selected at an early stage and to be published in advance for transparency reasons.

There was an absence of information in responses by participants on the processes followed for the selection and evaluation of contract award criteria together with review procedures and further linking the award criteria to the subject matter of the procurement. It is unclear as to whether the participants understood the new rules, how to apply them in practice or in fact

have review procedures to ensure meeting the requirements of transparency, equal treatment and non-discrimination.

There was a lack of understanding on the part of most participants on the obligations of contracting authorities and what they are entitled to do about either price or cost and how this feed into the procurement itself. This absence of understanding can result from either a lack of awareness of the rules or participant organisations following earlier procedures on a cost-effective methodology.

In relation to life cycle costing, the responses indicate either a lack of understanding of the rules especially in relation to environmental externalities or consider life cycle costing may not be appropriate to their procurements.

The results of the responses received in this area support my experience in practice and raise several concerns.

Framework Agreements

Most of the participants confirmed that they understood the type of framework agreements under the new rules but stated that in practice the new rules have not changed their choice of framework agreement for a required procurement whether works, services or supplies. None of the participants stated whether they had undertaken research on the practicalities for users of the new rules on framework agreements before commencing a procurement.

In relation to the selection of providers from a multi supplier framework agreement and awarding specific call-off contracts, the objective award criteria for call-offs from framework agreements and the type of award procedures operated for the procurement of framework agreements, all the participants stated that they understood the rules but had not changed their approach or procedures.

The responses from participants indicated that the new rules concerning notification of suppliers from a framework agreement raises questions of transparency at the award stage and lack of understanding. In addition, many of the participants who are central purchasing bodies leave the issuing of notices to suppliers and the publication of awards from call-offs to

the individual contracting authorities using the framework agreement and not the framework provider.

Abnormally Low Tenders

Participants were asked if the changes in the rules which are there to simplify the position of contracting authorities in relation to obligations and actions when seeking an explanation on any tender which is considered abnormally low. From the responses from participants, they appear not to fully understand the changes in the rules and the action to be taken. Several of the participants relied on the fact that there is no clear definition in the rules on abnormally low tenders. Some of the participants considered that the new rules have not in practice simplified seeking explanations from tenderers.

The obligations for a contracting authority to make clear reference in the tender documents to the fact that they will investigate and may ultimately reject any abnormally low tender was confirmed by only some of the participants and then only when it occurred.

In relation to having an approach for a clear and objective basis for internal decisions on abnormally low tenders including trigger levels of price, all participants confirmed that they have such processes in place but did not publish details in tender documents. It appears that many of the participants have a process but have not changed it to meet the new rules.

The responses of the participants confirm my experience in practice in relation to Abnormally Low Tenders.

- 2.3 Supplementary question 3 : Have the new rules in the four topic areas resulted in an improvement in the approach of procuring entities and consultants / legal advisers?

Selection Criteria

From the responses of participants, it appears that their approach now follows the statutory use of the CCS Standard Selection Questionnaire and PAS91. These documents although often queried by participants provide the basis for a common approach at selection criteria stage which is most important. In relation to the approach on the assessment and evaluation methodology at selection stage, many participants stated that they were not assessing or evaluating differently under the new rules.

The new rules through the mandatory documents have for a number of participants improved the approach of the participants and there is more consultation with stakeholders at this stage of a procurement although generally the operation of assessing and evaluating candidates under the new rules does not appear to have changed participant's approach to meet the new requirements.

Contract Award Criteria

The responses from participants in this area indicated that the approach taken was to follow previously operated procedures and experience in use did not follow the new rules. This could be as a result of a lack of understanding of the new rules or belief that their existing procedures meet the rules.

With regard to contract award criteria being linked to the subject matter, legal advisers found that criteria selection was in fact linked to previous procurements and was not aligned to the subject matter. It was also found that some contracting authorities felt they had free reign to use whatever criteria they wanted which was often not linked to the subject matter of the procurement. A number of the participants confirmed that they followed existing procedures in relation to Contract Award Criteria.

The new rules do not appear to have improved the approach of participants in this topic area. This confirms my experience in practice.

Framework Agreements

The responses from participants in this area indicate that the approach taken was to follow previously operated procedures and experience in use regardless of the new rules, possibly due to a lack of understanding of the new rules. Advice from one participant indicated that their role was to ensure their clients met the requirements of the new rules.

In general, the approach to the selection of objective criteria for Framework Agreements and Call-off Contracts has not changed.

In relation to the awarding of call-off contracts from a framework agreement, the limited regulation and controls in Directive 2014/24/EU has allowed participants a non-structured approach to follow in this important area.

The new rules do not appear to have improved the approach of participants in this topic area. This confirms my experience in practice.

Abnormally Low Tenders

The approach of participants in this topic area indicated that they do not either follow in practice the new rules or understand the obligations imposed by the rules. The procedures which would provide a good basis for the approach to meet obligations were only in place and followed by a few participants. Generally, the approach taken was to only investigate an abnormally low tender if required. This approach may result from there being no clear definition in the rules on abnormally low tenders.

The new rules do not appear to have improved the approach of participants in this topic area. This confirms my experience in practice.

6.2.4 Main Research Question : Have the new procurement rules in Directive 2014/24/EU simplified and improved the public procurement process?

In relation to simplification of the procurement process in practice most of the participants agreed that the new rules had been simplified in certain areas such as the introduction of the

light touch regime, modifications of contracts during their terms, the new procedure of competitive dialogue with negotiation, public contracts between entities within the public sector and electronic communication.

Several participants found that the new rules had made some areas in the procurement process more complex and made the procurement procedure harder in practice. The new rules were not perceived by the majority of participants to have simplified or improved the public procurement process. This may be as a result of either a lack of understanding of the rules in certain areas or a resistance to change existing procedures and processes followed by the participants. It was noted that many the changes and modifications to the rules covered by Directive 2014/24/EU were either not highlighted or referred to during the interviews. This may be as a result of lack of awareness or need to consider all the rules when undertaking procurements.

In practice I consider that only a few of the new rules have simplified the procurement process, these being the shortening of time frames in the procurement, less onerous selection / prequalification requirements, changes in the grounds for bidder exclusion and the promotion of innovation. In my opinion the new rules have improved flexibility in the areas of taking into account a wider range of characteristics of tenders, considering the best price/quality ratio, the light touch regime and access to the new competitive dialogue with negotiation.

In relation to the four topic areas of selection criteria, contract award criteria, framework agreements and abnormally low tenders, only a small number of the participants in the research agreed that the rules in these areas had either simplified or improved the procurement process.

The approach taken by participants in respect of the changes when undertaking procurement processes was generally that the changes did not warrant any alteration to their original procedures in the topic areas.

6.3 Originality and contribution to knowledge

To the best of my knowledge this study is the first to examine the impact of the laws in practice. There is literature which provides a detailed analysis of black letter / doctrinal law

but it does not examine the law as used by practitioners in the procurement process. There is therefore a significant gap in the knowledge which this thesis addresses by improving scholarship with its unique perspective from procuring entities, consultants and legal advisers through qualitative interviews.

For this subject matter I believe I provide originality with the combination of black letter law and empirical methodology and approach. This is because the black letter law methodology aims at identifying the strengths and shortcomings of the revised laws. It analyses these laws by reference to scholarship and caselaw on the subject. This approach identifies how these revised laws were intended to operate in theory. This black letter approach is then complemented by an empirical research methodology which examines the application of these revised laws in practice, from the perspective of key stakeholders in procurement. It enables the researcher to identify key areas of confusion, misapplication or incoherence which may not have been immediately obvious had the research confined itself to a purely theoretical study.

6.4 Conclusion and further study

My research has been conducted to ascertain how in practice the new rules have been perceived, understood, interpreted and applied in practice by participants who undertake the public procurement process. The research covers four selected topic areas; however, the outcome of the research could stimulate other studies on the application of the new rules in alternative areas to those chosen by me as covered in Directive 2014/24/EU which was transposed into the Public Contracts Regulations 2015 (as amended).

In this regard there could be research on the impact of laws in practice in specialist areas of public procurement such as The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.⁶¹⁶ In other areas of public procurement the impact of laws in practice by practitioners in public procurement could be researched in relation to Directive 2014/25/EU⁶¹⁷, this being the Utilities Directive transposed in The Utilities

⁶¹⁶ Statutory Instrument 2013 No. 500 - The National Health Service (Procurement, Patient Choice and Competition) (No. 2)

⁶¹⁷ Directive 2014/25 on the procurement by entities operating in water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

Contracts Regulations 2016⁶¹⁸ and also Directive 2014/23/EU⁶¹⁹, the Concessions Directive transposed into The Concessions Contracts Regulations 2016⁶²⁰.

From the findings, there is a clear requirement for the provision of practical training and guidance on the rules, obligations and how they are understood and applied in practice. The training could be supported by a toolkit of practical advice and application at all stages of a procurement. The documentation could also form the structure for ensuring compliance of the rules when operated in the procurement process and be a basis for auditing of the procurement procedures.

⁶¹⁸ Statutory Instrument (SI 2016/274) – Utilities Contracts Directive.

⁶¹⁹ Directive 2014/23 on the award of Concession Contracts [2014] OJ L94/1.

⁶²⁰ Statutory Instrument (SI 2016/273) – Concession Contracts Regulations.

BIBLIOGRAPHY

Cases

United Kingdom cases

All About Rights Law Practice v Legal Services Commission [2011] EWHC 964 (Admin)

Blackpool and Fylde Aero Club v Blackpool Borough Council [1990] 1 W.L.R. 1195

Clyde Solway Consortium v Scottish Ministers and others [2001] Scot CS 15.

Energy Solutions EU Ltd. v Nuclear Decommissioning Authority [2016] EWHC

Great Northern Railway v Witham (1873) L.R.90

Hazell v Hammersmith and Fulham, London Borough Council [1992] 2 AC1, [1991]

Healthcare at Home Ltd v Common Services Agency [2013] CSIH 22.

J Varney & Sons Waste Management Ltd v Hertfordshire County Council [2010] EWHC 1404 (QB)(Ch)

McLaughlin & Harvey Ltd v Department of Finance and Personnel [2008] NIQB 91; [2009] BLR 104.

Mears Ltd. v Leeds County Council [2011] EWHC 1031 (TCC).

NATS (Services) Ltd v Gatwick Airport Ltd [2014] EWHC 3133 (TCC)

R v Enfield Borough Council ex-parte TF Unwin (1989) 46 B.L.R. 1

R v HM Treasury Exp the University of Cambridge [2001] EWHC Admin 978

R v Yorkshire Purchasing Organisation ex Parte. British Educational Suppliers Association. The Times 1997.

Woods Building Services Ltd. v Milton Keynes Council [2015] EWHC 2011 (TCC)

European Union cases

Case C-44/96 Mannesmann Anlagenbau AG and others v Strohal Rotationsdruck GmbH [1998].

Case C-31/87 Gebroeders Beentjes BV v Netherlands ECR 1998 I-4625.

Case C-76/81 Transporante et Travaux SA v Minister of Public Works [1982] E.C.R. 417

Case C-81/98 Alcal Austria AG v Bundesministerium für Wissenschaft und Verkehr [1999] E.C.R. 1-07671

Case C-103/88 Fratelli Costanzo SpA v Commune di Milano [1989] E.C.R. 1839

Case C-107/98 Teckal Srl v Commune Design and Install Viano (Reggio Emilia) [1999] E.C.R. 1-08121

Case C-212/02 Commission v Austria [2004] (Judgement of 24 June 2004)

Case C-216/17 Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice Soc. coop. a.r.l v Azienda Socio-Sanitaria Territoriale della Vallecamonica - Sebino (ASST) and Others (ECJ, 19 December 2018).

Case C-225/98 Commission v France ECR 2000 p. I-7445

Case C-237-99 Commission v France [2001] E.C.R. 1-00939 CJ.

Case C-243/89 Commission v Denmark

Case C-285/99 Impresa Lombarda SpA v ANAS ECR 2001 I-9233.

Case C-295/89 Impresa Donà Alfonso Directive Dona Alfonso et Figli s.n.c. v Consorzio per lo sviluppo Industriale del Comune di Monafalcone [1991] E.C.R. 1-02967

Case C-299/08 Commission v France [2009] ECR 1-11587.

Case C-324/93 R v Secretary of State for the Home Department ex-parte Evans Medical Ltd. and Macfarlan Smith Ltd. [1995] ECR 1-563.

Case C-324/98 Telaustria and Telefonadress v Telekom Austria [2000] ECR1-10745.

Case C-336/12 Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S (ECJ, 10 October 2013).

Case C-340/02 Commission v France [2004] ECR I-9845.

Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding BV [1998] ECR1-6821.

Case C-373/00 Adolf Truley GmbH v Bestattung Wien GmbH [2003] ECR1-1931.

Case C-380/98 R (on the application of University of Cambridge) v HM Treasury; sub nom. R v HM Treasury

Case C-401/09 P. Evropaiki Dynamiki-Proigmena Systimata Tilepikoinonion Pliroforikis Kai Tilematikis AE v European Central Bank [2011] 3 C.M.L.R. 24 CJ

Case C-406/18 Uniplex (UK) Ltd. v NHS Business Services Authority [2010] PTSR

Case C-448/01 EVN Applicant Group and Wiestrom GmbH v Republic of Austria ECR 2003 I-14527

Case C-454/06 Presstext Nachrichtenagentur v Austria [2008] E.C.R. 1-04401

Case C-470/99 Universale-Bau AG v Entsorgungsbetriebe Simmoing GmbH [2002] E.C.R. 1-11617.

Case C-513/99 Concordion Buses Finland v Helsinki Municipality ECR 2002 I-7213

Case C-536/06 Emm. G. Lianakis v Dimos Alexandroupolis [2008] EWHC 1583 (QB) B.L.G.R. 908.

Case C-599/10 SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie (ECJ, 29 March 2010).

Case T-345/03 Evropaiki Dynamik v Commission [2008] E.C.R. 11-341.

Case T-553/11 European Dynamics Luxembourg and Others. [2014]

Joined Cases C-147/06 and C-148/06 SECAP and Santorso v Commune di Torino and Santorso Socooparl v Comune di Torino (“SECAP”) [2008] E.C.R. 1-3565

Statutes and Statutory Instruments

Bribery Act 2010

Draft Statutory Instrument 2019 - Exiting the European Union Public Procurement – The Public Procurement (Amendments etc.) (EU Exit) (No. 2) Regulations.

Draft Statutory Instrument 2019 – Exiting the European Union Public Procurement

Housing Act 1996.

Local Audit and Accountability Act 2014.

Local Authorities (Goods and Services) Act 1970.

Local Government Act 1972.

Local Government Act 1988

Local Government Act 1992

Local Government (Contracts) Act 1987.

Local Government, Planning and Land Act 1980

Local Government Act 1999

Prevention of Corruption Act 1906.

Prevention of Corruption Act 1916.

Public Services (Social Value) Act 2012

Statutory Instrument 1991 No. 2680

Statutory Instrument 1993 No. 3228

Statutory Instrument 1995 No. 201

Statutory Instrument 2000 No. 2009

Statutory Instrument 2006 No. 5 – The Public Contracts Regulations 2006.

Statutory Instrument 2009 No. 2992 – The Public Contracts (Amendment) Regulations.

Statutory Instrument 2011 No. 2053 – The Public Contracts (Miscellaneous Amendments) Regulations

Statutory Instrument 2013 No. 500 - The National Health Service (Procurement, Patient Choice and Competition) (No. 2)

Statutory Instrument 2015 No. 102 – The Public Contracts Regulations 2015

Statutory Instrument 2016 No. 273 – Concession Contracts Regulations.

Statutory Instrument 2016 No. 274 – Utilities Contracts Directive.

Statutory Instrument 2016 No. 275 – The Public Procurement (Amendment, Repeals and Revocations) Regulations.

The Public Bodies Corrupt Practices Act 1889.

European Union legislation

Council Directive 2004/17/EC of 31 March 2004 co-ordinating the procurement procedures of entities in the water, energy, transport and postal services sector [2004] O.J. L358/35.

Council Directive 2004/18/EC of the European Parliament and Council of 31 March, 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts [2004] O.J. L134/114.

Council Directive 2004/18/EU Public Sector Directive [2004] O.J. L134/1.

Council Directive 64/427 (OJ 1964 No. 117/1863),

Council Directive 64/428 (OJ 1964 No. 117/1871) and Council Directive 64/429 (OJ 1964 No. 117/1880).

Council Directive 7/66/EC [2007] OJ L335/31

Council Directive 70/32 (OJ 1970 L13/1)

Council Directive 71/304 (OJ 1971 L185/1)

Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.

Council Directive 77/62 (OJ 1997 L13/1)

Council Directive 88/295/EEC [1988] OJ L127/1

Council Directive 89/440/EEC [1989] OJ L127/1

Council Directive 89/655/EEC [1989] OJ L 395/33

Council Directive 89/665/EEC Remedies Directive [1989] O.J. L395/33.

Council Directive 90/531/EEC [1990] OJ L297/1

Council Directive 92/50/EEC [1992] O.J. L209/1.

Council Directive 92/50/EEC [1992] OJ L209/1 Council Directive 93/36/EEC [1993] for Public Supplies Council Directive 93/37/EEC [1993] for Public Works Contracts and Council

Council Directive 93/36/EEC [1993] OJ L199/1

Council Directive 93/37/EEC [1993] O.J. L199/54.

Council Directive 93/37/EEC [1993] OJ L199/54

Council Directive 93/38/EEC [1993] for Utilities Contracts.

Directive 2014/23/EU of the European Parliament and of the Council on the award of Concessions Contracts [2014] OJ L94/1.

Directive 2014/24/EU of the European Parliament and Council of the 25 February 2014 on public procurement and repealing Directive 2004/18/EC

Directive 2014/25/EU of the European Parliament and of the Council of the 26 February 2014 on procurement by entities operation in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] O.J. L94/243.

Single European Act [1987] OJ L169

United States of America legislation

The Small Business Act (1953) together with the Small Business Reauthorisation Act (1997) codified and amended at 15 USC Section 644(j)

Books

Anechiarico F and Jacobs J B, *The Pursuit of Absolute Integrity: How Corruption Control makes Government Ineffective*. (University of Chicago Press 1996)

Arrowsmith S, *The Law of Public and Utilities Procurement : Regulation in the UK and EU* (3rd edn, vol 1 Sweet & Maxwell 2014)

Arrowsmith S, *The Law of Public and Utilities Procurement – Regulation in the EU and UK* (3rd edn, vol 2 Sweet & Maxwell, 2018).

Aspey E, *Supplier Challenges in the UK* (Achilles Group 2011).

Bryman A, *Research Methods and Organisation Studies* (Routledge 1992)

Bryman A, *Social Research Methods*, (5th ed, OUP, 2016).

Butler L, *‘Exclusion, Qualification and Selection in Public Procurement* (DJØF Publishing 2015).

Carlsen B and Glenton C, *What about N? A methodical study of sample size reporting in focus group studies* (BMC Medical Research Methodology 11, 2011)

Chisnell P, *Marketing Research* (7th edn, McGraw-Hill Education, 2005)

Cirell S and Bennett J, *Charging and Trading in Local Government* (Sweet & Maxwell 2003).

Coe CK, *Public Financial Management* (Prentice Hall 1989)

Collins J and Hushey R, *Business Research* (Palgrave Macmillan 2003).

Covington C *Return on investment v return for human resources* (The Source 2006) vol 2(3).

Craig P and de Búrca G, *EU Law (Text, Cases and Materials)*, (6th edn, OUP 2015)

De Koninck C, Ronse T and Timmermans W, *The public sector procurement Directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (2nd edn, Wolter Kluwer 2015)

Denscombe M, *The Good Research Guide for small scale and social research* (OUP 2003) 12.

El-Gayed Y, *The Influencing Factors of Public Procurement Policy Development: The Case of Libya* (University of Salford 2013)

Gosling P The effects of Compulsory Competitive Tendering and European Law on Local Authorities (Kluwer Law International 2001)

Hughes J and Day M, Why Public Procurement is critical to the UK Economic Performance and how to transform it (Henley Business School/University of Reading and Future Purchasing Consulting Ltd. 2011).

Kelman S, Procurement and Public Management: The fear of Discretion and the Quality of Government Performance (AEI Press 1990)

King G, O'Keohane R and Verba S, Designing Social Enquiry : Scientific Interface in Qualitative Research (Preston University Press 1994).

Knight L, Harland C, Telgren J, Thai K V, Callender G and McKen K, Public Procurement: International Cases and Commentary (Routledge 2007)

Korobkin R, Empirical Scholarship in Contract Law : Possibilities and Pitfalls (University of Illinois Law Review [2002] 1033 UCLA).

Kruger R and Casey M A; Focus Group, A Practical Guide for Applied Research (3rd edn, Sage Publications 2000).

Kvale S, An introduction to Qualitative Research Interviews (Sage Publications 1996) 129-131.

Lichère F and Richetto S, Modernising Public Procurement : The New Directive (DJØF Publishing 2014)

Lysons K and Farrington B, Purchasing and Supply Chain Management (Pearson Education Ltd. 2006)

Marshall C and Rossman G, Designing Qualitative Research (6th edn, Sage Publications 2016)

Mason J, Qualitative Research (2nd edn, Sage Publishing 2002).

Mathers N, Fox N and Hunn A, Trent Focus for Research and Development in Primary Health Care : Using Interviews in a Research Project (Trent Focus 1998)

McClelland JF, Maximising the Impact of Welsh Procurement Policy – Full Report (Welsh Government 2012).

Milne R, Roy G and Angeles L, Competition, Quality and Contract Compliance – Evidence from Compulsory Competitive Tendering in Local Government in Great Britain 1987-2000 (33(4), Fiscal Studies 2013)

Page HR, Public Purchasing and Materials Management (Heath & Company. 1980)
Parker D. The 1988 Local Government Act and Compulsory Competitive Tendering (Cranfield School of Management. 1990)

- Patton M, Qualitative research and evaluation methods (3rd edn, Sage Publishing 2002).
- Premehard A, Public Expenditure Management (International Monetary Fund 1993).
- Pritchard J & Lasko-Skinner R, Please Procure Responsibly, The state of public service commissioning (Reform Research Trust 2019)
- Punch K, Introduction to Social Research : Quantitative and Qualitative Approaches (2nd edn, Sage Publications 2005)
- Reuter P, La Communauté du Charbon et de l'Acier (France, 1953)
- Robson C, Real World Research : A Resource for Social Scientists and Practitioner Researchers (2nd edn, Blackwell Publishers 2016).
- Robson C and McCartan K, Real World Research : A Resource for Users of Social Research Methods in Applied Settings (4th edn, John Wiley & Sons Ltd. 2016)
- Rubin H and Rubin I, Qualitative interviewing, the art of hearing data (3rd edn, Sage Publishing 2011)
- Sanchez Graells A, Public Procurement and the EU Competition Rules (3rd edn, Hart Publications Ltd 2015)
- Saunders M, Lewis P and Thornhill, Research Methods for Business Students (5th edn, Financial Times/Prentice Hall 2007)
- Semple A, A Practical Guide to Public Procurement (OUP 2015)
- Skovgaard Ølykke G and Sanchez Graells A, Reformation or Deformation of EU Public Rules (Edward Elgar 2016)
- Strauss A and Corbin J, Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory (2nd edn, Sage Publications 1998).
- Strauss A and Corbin J, Basics of qualitative research : Techniques and procedures for developing grounded theory (4th edn, Sage Publications 2014).
- Thai K V, International Handbook of Public Procurement (Taylor and Francis 2009)
- Thai KV, Public Procurement Re-examined (PrAcadamies Press. 2001)
- Thomas AG, Principles of Government Purchasing (Appleton & Company. 1919)
- Trepte P, Public Procurement in the EU – A Practitioner's Guide (OUP 2nd edn, 2007)
- Trepte P, Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation (OUP 2004)

Vogul L, Macroeconomic Effects of Cost Savings in Public Procurement, European Countries (Economic Papers 2009)

Walker H and Brammer S, Sustainable Procurement Practice in the Public Sector: An International Comparative Study (University of Bath 2007)

Weiss F, Public Procurement in European Community Law (Athlone Press. 1993)

West R, 'Collaboration can Create Cost Cutting' (2012) 19 Supply Chain Europe

Wilson D, Game C, Leach S and Stoker G, The Impact of Competitive Tendering (Macmillan Education UK 1994)

Edited books

Arrowsmith S (ed), Public Procurement Regulation: An Introduction (University of Nottingham 2010).

Lichère F, Caranta R and Treumer S (eds) Modernising Public Procurement: The New Directive, (DJØF 2014)

Contributions to edited books

Andrecka M, 'Clarification or missed opportunity? The provision of Framework Agreements in the 2014 Directive' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds) Reformation or Deformation of the EU Public Procurement Rules (9 Edward Elgar Publishing 2016)

Arrowsmith S, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in S Arrowsmith and A Davis (eds) Public Procurement Global Revolution (Kluwer 1998)

Arrowsmith S, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Arrowsmith S, Linarelli J and Wallace D Jr., Regulatory Public Procurement: National and International Perspectives. (Kluwer Law International, 2000)

Arrowsmith S, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Arrowsmith S (ed), Public Procurement Regulation: An Introduction (University of Nottingham 2010)

Arrowsmith S, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Treumer S, (eds) Evolution of the EU Public Procurement Regime: The New Public Procurement Directive in Lichere F, Caranta R and Treumer S (eds) Modernising Public Procurement – The New Directive (DYØF Publishing 2014)

Baldwin J and Davis G, 'Empirical Research in Law' in P. Cane and M. Tushnet (eds) Handbook of Legal Studies (OUP 2005)

Denzin N and Lincoln Y, 'Introduction : The Discipline and Practice of Qualitative Research' in Denzin and Lincoln (eds), *The Sage Handbook of Qualitative Research* (3rd edn, Sage Publications 2005)

Fontana A and Trey J, 'Interviewing : The art of science' in N.K. Denzin and Y.S. Lincoln (eds) *Handbook of Qualitative Research* (Sage Publishing 1994)

Herrera Anchustegui I, 'Division into lots and demand aggregation – extremes looking for the correct balance?' in G Skovgaard Ølykke and A Sanches-Graells (eds), *Reformation or Deformation of EU Procurement Rules* (Edward Elgar Publishing 2016)

Morse J, 'Strategies for Sampling' in Morse J (ed) *Qualitative Nursing Research, A Contemporary Dialogue* (Sage 1991)

Risvig Hamer C, 'Requesting addition information-increase of flexibility and competition' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds) *Reformation or Deformation of the EU Public Procurement Rules* (10 Edward Elgar Publishing 2016)

Sandelowski M, *Theory and guises of theory in qualitative research, Research in Nursing and Health* (Vol 16 Issue 3, John Wiley & Sons Inc. 1993)

Treumer S, 'Evolution of the EU Public Procurement Regime' in Francois Lichère, Roberto Caranta, Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014)

Treumer S, 'Flexible Procedures or Ban or Negotiations? Will more negotiations limit the access to the procurement market' in Grith Skovgaard Ølykke, Carina Hansen, Tvarno (eds), *EU Procurement – Modernisation, Growth and Innovation* (DJØF Publishing 2012)

Publications

United Kingdom Publications

Annual Review of Social Housing 2017; Beever and Struthers, Chartered Accountants.

Auditor General for Wales, 'Public Procurement in Wales' (Welsh Audit Office 2017)

Cabinet Office, *Accelerating Government Procurement, Management Summary of the findings of a 'team study' to investigate waste and inefficiency in government procurement proceedings* (2011)

Cabinet Office, *Explanatory Memorandum to the Public Contracts Regulations* (2005)

Cabinet Office, *Making a Difference: Reducing Bureaucracy in Central Government*. (2003)

Cabinet Office, *Procurement Policy Note: The Public Services (Social Value) Act 2012 – Advice for Commissioners and Procurers*. Information Note 10/12 (December 2012)

Cabinet Office, *Results of Lean Review* (February 2011).

Cabinet Office, Social Value Act Review (2015)

Cabinet Office, The Outsourcing Playbook, Central Government Guidance on Outsourcing Decisions and Contracting, February 2019.

Cabinet Office: Making Government business more accessible to SMEs – One Year On (2012)

Communities and Local Government, Procurement Guidance (Stationery Office 2014)
Crown Commercial Service Policy Note : Standard Selection Questionnaire Advice Note 8/16 9 September 2016.

Crown Commercial Service, Brief Guide to the new EU Public Contracts Directive (2014).

Crown Commercial Service, Guidance in awarding Contracts under the Public Contracts Regulations 2015 (2016).

Crown Commercial Service, Guidance on the new transparency requirements for publishing on Contracts Finder, – Minimum data requirements for publication, March 2015

Crown Commercial Service, Procurement Policy Note – Promoting Greater Transparency, Information Note PPN 02/17 December 2017.

Crown Commercial Service, Procurement Policy Note 07/16 : Legal requirements to publish on Contracts Finder, - Publishing contract award.

Crown Commercial Service, The PCR 2015 and The Utilities Contracts Regulations 2016 – Guidance on Framework Agreements : An Overview, Key Points and Frequently Asked Questions October 2016

Crown Commercial Services of the Cabinet Office : Policy Procurement Note 02/15 Public Contracts Regulations 2015.

Frederick D, Why Compulsory Competitive Tendering for Local Government Services is not as good as Privatisation (Economic Notes 54. 1994)

Gershon P, Review of Civil Procurement in Central Government (H.M. Treasury, 1999)

Gershon P, Releasing resources to the front line : Independent review of public sector efficiency (HM Stationery Office, 2005)

Government Commercial Function of the Cabinet Office. The Central Government Guidance on Outsourcing Decisions and Contracting, February 2019.

Government Commercial Function, The Outsourcing Playbook – Central Government Guidance on Outsourcing Decisions and Contracting (Cabinet Office 2019)

Green P, Efficiency Review – Key Findings and Recommendations (Cabinet Office 2010).

H.M. Treasury, Transforming Government Procurement (January 2007)

H.M. Treasury, Managing Public Money-Annex 4.6, March 2018.

H.M. Treasury, Review of Civil Procurement in Central Government (1999)

Homes & Communities Agency, Annual Review – Procurement Efficiency Initiative 2013-2014.

House of Commons, Public Administration Select Committee (PASC) – Government Procurement: Government Response to the Committee’s Sixth Report of Session 2013-14 (Stationery Office Ltd 2014)

Institute of Government, ‘Government Procurement – The scale and nature of contracting in the UK’ (Gowling WLG 2019)

Local Government Association NAG and SOPO members only monthly newsletter, March 2019 sent to all local authority procurement officers.

Local Government Association, National Procurement Strategy for Local Government in England (2003)

Local Government Group, Response to Consultations of Office of Government Commerce (OGC) (Review of Public Procurement Directives 2011)

Lord David Young, Growing your Business: A Report on Growing Micro Businesses (Second Part) May 2013.

Lord David Young, Make Business your Business: A Guide to Starting and Developing a New Business, (First Part) May 2012.

Lord David Young, The Report on Small Firms 2010-2015 (Prime Minister’s Office 2015)

National Audit Office, Modernising Procurement 1998

National Audit Office Report on the Efficiency and Reform Group of the Cabinet Office (The Stationery Office 2013).

National Audit Office, A Review of collaborative procurement across the public sector (London NAO/Audit Commission, May 2010).

National Audit Office, Improving government procurement. Report by the Comptroller and Auditor General, Cabinet Office 26 February 2013

Office of Government Commerce. (OGC) Guidance in Framework Agreements in the Procurement Regulations, September 2008

Office of Government Commerce (OGC), Introduction to the EU procurement rules, March 2008.

Office of the Deputy Prime Minister, Report on Local Government in England, November 2003.

OGC and SBS, Small supplier, better value? The value for money that small firms can offer (2006) and ODPM (Office of Deputy Prime Minister) ‘Small Business Friendly Concord’ (2006)

Public Administration Select Committee : Government Procurement (6th Report of Session 2013-2014 London, Stationery Office 2013).

Publicly Available Specification (PAS91) 2017+A1 published by the British Standards Institution.

The Tenant Services Authority (TSA), Top 200 Social Housing Providers – 24 Housing, August 2011.

United Kingdom response to the European Commission Green Paper on the modernisation of EU procurement policy, COM (2011) 15 final – Unclassified.

Welsh Government, ‘Framework Agreements : Procurement Advice Note (PAN)’ [2017] Welsh Public Sector

European Union Publications

Council of Europe, The Role of Competitive Tendering in the effective provision of Local Services (1994).

Europe 2020: A Strategy for smart, sustainable and inclusive growth March 3, 2010 Com (2010) 2020 final.

European Commission Explanatory Note “Framework Agreements - Classic Directive” (CC 2005/03-rev/of 14.07.2005)

European Commission Implementing Regulations (EU) 2016/17 to establish the standard form for the European Single Procurement Document [2016] OJ L3/16.

European Commission Report from the Council and the European Parliament – EU Anti-Corruption Report (2014)

European Commission White Paper for the Completion of the Internal Market (1985)

European Commission, Commission Recommendation on the professionalisation of public procurement – Building an architecture for the professionalisation of public procurement SWD (2017) 327 final

European Commission, European Commission Staff Working Paper, Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation 27 June 2011 SEC (2011) 853 final.

European Commission, European Commission Staff Working Paper, Evaluation Report : Impact and Effectiveness of EU Public Procurement legislation 27 June 2011 SEC (2011) 853 final.

European Commission, Green Paper on the modernisation of EU procurement policy, Towards a more efficient public procurement market (COM 2011 15 final)

European Commission, Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market COM (2011) 15 final.

European Commission, Green Paper, Public Procurement in the European Union, Exploring the Way Forward (1996) COM 583 final

European Commission, Internal Market, Industry entrepreneurship and SMEs

European Commission, Public Procurement Guidance for Practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds, Publications Office of the European Union, 2015

European Commission. Communications from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee for the Regions, ‘Towards a Single Market Act 2010’ Com (2010) 608 final/2

European Commission’s Communication on Public Procurement in the European Union Com (1998)

European Council, European Charter for Small Businesses (2000) and Commission Communication ‘Think Small First - A Small Business Act for Europe. Com (2008) 394 final.

European Parliament resolution of 18 May 2010 on new developments in public procurement and European Parliament Resolution of 25 October 2011 on modernisation of public procurement.

European Parliament, General Programme for the abolition of restrictions on freedom to provide services (OJ 2/32) and General Programme for the abolition of restrictions on freedom of establishment (OJ 2/36).

Kiljunen K. The European Constitution in the Making (Centre for European Policy Studies. 2004)

Krugner M, The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions (2003)

Monti M, A new strategy for the Single Market at the Service of Europe’s Economy and Society – A Report to the President of the European Commission José Manuel Barroso (2010)

Monti M, Report to the President of the European Commission May 9, 2010 ‘A new strategy for the Single Market – at the Service of Europe’s economy and society’.

Parliament and Council Directive 2004/18 (OJ 2004 L134/114) on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts

Proposed Procurement Directive. Explanatory COM (2011) 896 final, 2011/0438 (COD)

Schotanus F and Telgen J, Implications of a classification of forms of co-operative purchasing (Proceedings of the 21st IMP Conference, Rotterdam, 2005)

Vadiya K, Sajeev A S M and Callender G, E-procurement initiatives in the public sector: An investigation into the critical success factor (Proceedings of the 13th Annual IPSERA Conference, Catania. (2004).

Van Abeelee E, The reform of the EU's public procurement directives : a missed opportunity? (Working paper 2012.11 ETU1 aisbi Brussels)

International Publications

Organisation for Economic Co-operation and Development (OECD/SIGMA), Public Procurement Brief 29, Detecting and Correcting Common Errors in Public Procurement, July 2013. Available at http://www.sigmaxweb.org/bytopic/publicprocurement/Common_Errors_Public_Procurement_2013.pdf

Organisation for Economic Co-operation and Development (OECD), Recommendations of the Council on Public Procurement, Directorate of Public Procurement and Territorial Development 2015

Organisation for Economic Co-operation and Development (OECD): Preventing Corruption in Public Procurement (2016)

Organisation for Economic Co-operation and Development (OECD/SIGMA) Public Procurement Brief 29, Detecting and Correcting Common Errors in Public Procurement 2016.

Support for improvement in Governance and Management (SIGMA), Audit of Procurement, Brief 28 June 2013, European Commission and OECD.

Journals

Andrecka M, 'Dealing with legal loopholes and uncertainties within EU Public Procurement Law regarding Framework Agreements' (2016) 16(4) Journal of Public Procurement

Andrecka M, 'Framework Agreements : Transparency in the Call-off Award Process' (2015) 10(4) European Procurement and Public Procurement Law Review

Andrecka M, 'Framework Agreements EU procurement law and practice' (2015) No. 2 Procurement Law Journal

Archibald M and Munce M, 'Challenges and Strategies in the Recruitment of Participants for Qualitative Research'. (2015) 11 University of Alberta Science Journal

Arrowsmith S and Smith S, 'The 'Lord Young' Reforms on transparency of information and selection of firms to be invited to tender under the PCR 2015: A Practical Analysis of the Legal Provisions' (2018) 2 PPLR.

Arrowsmith S, 'Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard' (2004) 53 International and Comparative Law Quarterly

Arrowsmith S, 'Special issue – The New Procurement Directives' (2014) Part 1 Editor's Note' PPLR 81.

Arrowsmith S, 'The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?' (2006) 35(3) Public Contracts Law Journal

Arrowsmith S, Modernising the EU's public procurement regime: A Blueprint for real simplicity and flexibility (2012) 21 PPLR

Charmaz K "Discovering' chronic illness using Grounded Theory' Social Science & Medicine.(1990) 30(11) Elsevier Ltd.

Coyne I, 'Sampling in Qualitative Research : Purposeful and theoretical sampling – merging or clear boundaries' (1997) 26 Journal of Advanced Nursing

Dekel O, 'The Legal Theory of Competitive Bidding for Government Contracts' (37 P.C.L.J. 237 2008)

Diggins L and Bennett J, EC Public Procurement Law and Practice (1(1) Sweet & Maxwell 2010)

Eyo A, Evidence on the use of Dynamic Purchasing Systems in the United Kingdom [2017] 26(6) PPLR

Fraser Johnson P, Leenders M R and McCue C, 'A comparison of purchasing's organisational roles and responsibilities in the public and private sectors' (2003) 3(1) Journal of Public Procurement

Grandia J and Meehan J, 'Public Procurement as a policy tool using procurement to reach desired outcomes to society' (2017) 30(4) International Journal of Public Sector Management

Kallio, H, Pietila, A, Johnson, M and Kangasniemi, M 2016, 'Systematic methodological review : developing a framework for a qualitative semi-structured interview guide' , Journal Of Advanced Nursing, **72** (12) ,

Knight's Guide to Best Value and Competitive Tendering Law, (Issue 12 2000) B1-7

Kvale S; 'The Qualitative Research Interview. A phenomenological and hermeneutical mode of understanding' (1983) 14(1-2) Journal of Phenomenological Psychology.

Local Government Act 1972.

Marshall M, Sampling for Qualitative Research. Family Practice (Vol 13 No. 6 OUP 1996).

Matthews D, 'Strategic Procurement in the Public Sector: A Mask for Financial and Administrative Policy' (2005) 5(3) Journal of Public Procurement

Murray J G, 'Local Government demands more from purchasing' (1999) 5(1) European Journal of Purchasing and Supply Management

Patton M and Sandelowski M, 'Theory unmasked : The uses and guises of theory in qualitative research', Research in Nursing and Health (Vol 16 Issue 3 John Wiley & Sons Inc. 1993)

Sanches-Graells A, The copy-out of Directive 2014/24/EU in the UK and its limited review despite the imminence of Brexit (2019) 5 PPLR

Sandelowski M, Theory and guises of theory in qualitative research, Research in Nursing and Health (1993) 16(3) John Wiley & Sons Inc.

Schapper P R, Veiga Malta J N and Gilbert D L, 'An analytical framework for the management and reform of public procurement' (2006) 6(1) Journal of Public Procurement

Snider K F, 'Procurement Leadership: From Means to Ends' (2006) 6(3) Journal of Public Procurement

Sylvia de Mars, The limits of general principles : a procurement case study (2013) 38(3) ELR

Thai K V, 'Public Procurement Re-examined' (2001) 1(1) Journal of Public Procurement
Thomas J, Public Procurement and Lord Young's Reforms – Two Years On (2018) 27 PPLR Issue 4,

Walker H and Brammer S, 'Sustainable procurement in the United Kingdom public sector' (2009) 14(2) Supply Chain Management

Websites and blogs

Brim J, YPO World Conference of Procurement posted by Lucy Patchett in Procurement Public Sector. www.cips.org/en/supply-management/news/2019/july

Coutin S, Qualitative Research in Law and Social Science 2012 p10 available at ResearchGate.net.

Crown Commercial Service, Commercial and Procurement Training – available at www.gov.uk/guidance/commercialandprocurementtraining

Departments, agencies and public bodies available at www.gov.uk/government/organisations

European Commission, Public Procurement
<<https://ec.europa.eu/growth/singlemarket/public-procurement-en>> 2018

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/356492/Consultation Document UK Transposition of new EU Procurement Directives Public Contracts Regulations 2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/356492/Consultation_Document_UK_Transposition_of_new_EU_Procurement_Directives_Public_Contracts_Regulations_2015.pdf)

<https://ec.europa.eu/info/departments/internal-market-industry-entrepreneurship-and-SMEs>

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:28:FIN>

<https://www.gov.uk/guidance/transposing-eu-procurement-directives>

<https://www.legislation.gov.uk/ukxi/2015/102/memorandum/contents>

Leanne Edwards, ‘Dynamic Purchasing Systems and the Death of procurement frameworks’, available at www.procurious.com/procurementnews/dynamic-purchasing-systems-and-the-death-of-procurement-frameworks

List of registered providers of social housing available at www.gov.uk/government/publications/current-registered-providers-of-social-housing

Local Government Association A-Z of Councils available at www.local.gov.uk/our-support/guidance-and-resources

Public Authorities listed as ‘Professional Buying Organisations’ available at www.whatdotheyknow.com

S. Surbhi, ‘Difference between Public Sector and Private Sector’ (26 July 2018)
<<https://keydifferences.com/difference-between-public-sector-and-private-sector.html>>

Simplification for whom – Telles.eu. March 28 2017
<http://www.telles.eu/blog/2017/3/28/simplification-for-whom>

Tenders Electronic Daily (TED) – public procurement notices available at www.ted.europa.eu/

Turner D; Qualitative Interview Design : A practical guide for the novice researcher. The Qualitative Report 15(3) 2010 p754-760 available at <https://insuworks.nova.edu/tqr/vol15/iss3/19/>

APPENDIX 1

Invitation to participate in a Public Procurement research study

Dear

My name is Robert Wren and I am studying for a Professional Doctorate at the School of Law at Anglia Ruskin University, Cambridge. I am a Public Procurement Consultant and principal of my own private practice which has for the last fifteen years specialised in procurement in the Public Sector.

My research project is under the supervision of Dr. Aldo Zammit Borda of Anglia Ruskin University and Dr. Ama Eyo of Bangor University. The research is being undertaken to ascertain whether the new procurement rules have simplified and improved the public procurement process.

This email is an invitation to participate in the research as your organisation has been identified as a valuable participant because of its undertaking, expertise and experience in the field of public procurement and the operation of the Public Procurement Rules. Participation will take the form of a short semi-structured interview of no more than 45 minutes and will be conducted by me either travelling to your organisation or an alternative location, by telephone or other face to face communication convenient to you.

I hope you are able to participate in this research as your input is invaluable not only for my research but to enable a more sophisticated and accurate understanding of the challenges which could potentially be used to influence public policy and the operation of public procurement in the future. My research will therefore be relevant whether or not there is a deal for Brexit.

Please email me using my university address which is robert.wren@pgr.anglia.ac.uk if you are able to participating in this research. I can confirm that any information you provide in connection with this research will be treated as confidential and neither your name nor your organisation's name will appear in the thesis or any other published work.

In the event you are unable to participate it would be appreciated if you could refer my research invitation to another member of your procurement team.

I look forward to hearing from you.

Thank you in anticipation,

R.J. Wren MCIPS

Professional Doctorate Candidate

APPENDIX 2

Interview Guide

This Interview Guide contains the questions to be asked of and addressed by the participants. The questions aim to extract information from participants relating to their various experiences, use and understanding of the new procurement rules which it is said have been simplified and made more flexible. The questions relate to four topics where I, as a procurement practitioner have found there are areas which I consider require research to be undertaken.

A General Questions

1. Can you provide a reasonable estimate of the total number of above threshold public procurements conducted by you on behalf of your organisation and the number of Clients you have provided advice to since the introduction of the Public Sector Directive 2014 and the Public Contracts Regulations which transposed the Directive into law in England, Wales and Northern Ireland.
2. Do you consider that the introduction of the new procurement rules has simplified the operation of the procurement process and made their use more flexible?
3. Did the introduction of the new procurement rules lead to either new training procedures / techniques or retraining procedures for your procurement team to meet the changes?
4. If the answer is Yes, what type of training or retraining procedures were adopted?

B Selection Criteria

1. Although the general headings of Selection Criteria are similar under the previous rules, the list of possible Selection Criteria is still an exhaustive one. How does your organisation select the Criteria for each individual procurement?
2. There have been changes in the new rules in relation to financial and economic criteria. How has your organisation addressed the criteria especially in relation to Contracts in Lots and reviewed the forms of evidence which are required to be provided at Selection stage?
3. How has your organisation considered and verified technical and professional ability of economic operators including efficiency, experience and performance in previous contracts?
4. Has your organisation changed its evaluation methodology of the Selection Criteria under the Open Procedure and the Restricted Procedure?

- 5(a). Does your organisation have a procedure for dealing with and remedying any conflicts of interest found when evaluating technical and professional ability?
- 5(b). Do you have a provision in the procurement documents for a discretionary exclusion for any conflict of interest that is found during the procurement process?

C Contract Award Criteria

1. Have the latest provisions to the rules on Contract Award Criteria in relation to Most Economically Advantageous Tender (MEAT)
 - (1) enhanced your organisation's understanding of MEAT?
 - (2) now require your organisation to assess and evaluate Tenders differently and in which areas are there changes being undertaken?
2. How does your organisation select and assess the Contract Award Criteria for each individual procurement under the new rules and do you have a review procedure so that the contract award criteria are linked to the subject matter and ensures effective competition?
3. How does your organisation identify the basis of price or cost for a particular proposed procurement using a cost-effective approach and in which areas has the cost-effective approach changed since the introduction of the new provisions?
4. Has your organisation used Life Cycle Costings as part of the best price/quality ratio and has the information for the requirement for Life Cycle Costing simplified the setting and evaluation of the criteria? In the event the answer is 'yes', please explain.

D Framework Agreements

1. Which type of Framework Agreements are you using more under the new rules on Framework Agreements? Are these
 - (i) Single supplier
 - (ii) Multi supplier
 - (iii) A mixture of both types.
2. Do you now find one of the types of Framework Agreements more appropriate than another in relation to
 - (i) Particular types of contract – works, services or supplies.
 - (ii) Sector related contracts – consultancy, construction works, cleaning and maintenance.

Have the new rules changed your choice on the type of Framework Agreement you consider more appropriate to your requirements?

3. When procuring a multi provider Framework Agreement, which method do you operate to select the providers and place specific contracts?
4. What types of objective award criteria do you use for the subsequent call-off of a contract from a Framework Agreement?
5. Which of the award procedures do you operate, these being open, restricted or another procedure, to conduct the procurement of Framework Agreements and have the new Regulations changed your selection of procedure?
6. How do you now notify members on a Framework Agreement of the results of direct selection or mini competition?

E Abnormally Low Tenders

1. Have the changes in the rules on Abnormally Low Tenders which are there to simplify the position of the Contracting Authority, made your obligations and the action to be taken clearer when seeking an explanation on any Tender which you consider appears abnormally low?
2. Within the Tender documents you prepare is there a clear reference to confirm that the authority may investigate and ultimately reject any Tender it may consider to be abnormally low? Was this reference included in Tender Documents before the new rules, if so, has the content of such a reference been made clearer?
3. Has your organisation a clear and objective basis in place for internal decisions to treat a Tender as abnormally low such as a trigger point for the investigation of a Tender considered as abnormally low? Is there any difference depending on whether a Tender is for works, services or supplies?
4. Does your organisation maintain and then retain a clear audit trail of all evaluation and investigation considerations and clarifications? If so, have the new rules changed your audit procedure and if so, what areas are different?

F Concluding Question

1. What is your overall view and assessment of whether the changes in the rules have simplified and been made more flexible in relation to the four topics of selection criteria, contract award criteria, framework agreements and abnormally low tenders?